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ABSTRACT

The current capabilities of Federal Agencies to measure the extent to which minorities receive the benefits of Federal domestic assistance programs were evaluated by the U.S. Commission on Civil Rights. The use and collection of racial and ethnic data; responsibility for racial and ethnic data collection and use; and the legal issues of authority, constitutional protection against the invasion of privacy, and State-Federal conflicts were evaluated. The Commission's findings were based on information gathered from six Federal Agencies which administer many of the largest domestic assistance programs and two Agencies with special statistical responsibilities: the Departments of Agriculture; Health, Education, and Welfare; Housing and Urban Development; Labor; Transportation; and the Veterans Administration; the Office of Management and Budget; and the Bureau of the Census. Also using additional information supplied by minority organizations, the Commission found that the scant data collected by Federal Agencies were insufficient for determining the degree Federal benefits are reaching minority groups on an equitable basis, thus making it impossible to determine whether program benefit distribution is free from discriminatory practices. This report also described the parameters for creating a data collection system necessary to measure the extent to which minorities receive domestic assistance benefits. (NQ)

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Collection and Use of Racial and Ethnic Data in Federal Assistance Programs

A Report of
the United States
Commission on
Civil Rights

FEBRUARY
1973

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U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan Agency established by Congress in 1957 and directed to:

Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, or national origin;

Study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, or national origin;

Appraise Federal laws and policies with respect to the equal protection of the laws because of race, color, religion, sex, or national origin;

Serve as a national clearinghouse for information in respect to denials of equal protection of the laws because of race, color, religion, sex, or national origin; and

Submit reports, findings, and recommendations to the President and the Congress.

Members of the Commission

Rev. Theodore M. Hesburgh, C.S.C., *Chairman*
Stephen Horn, *Vice Chairman*
Frankie M. Freeman
Maurice B. Mitchell
Robert S. Rankin
Manuel Ruiz, Jr.

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LETTER OF TRANSMITTAL

U.S. Commission on Civil Rights
Washington, D.C. 20425
January 1973

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The U.S. Commission on Civil Rights presents this report to you pursuant to Public Law 85-315, as amended.

Continuing the Commission's examination of the Federal civil rights enforcement effort, this report evaluates the current capabilities of Federal Agencies for measuring the extent to which minorities receive the benefits of Federal domestic assistance programs. It also describes the parameters for creating a data collection system necessary for such measurements.

The Commission based its findings on information gathered from six Federal Agencies which administer many of the largest programs of Federal domestic assistance: the Departments of Agriculture; Health, Education, and Welfare; Housing and Urban Development; Labor; Transportation; and the Veterans Administration and from two Agencies with special statistical responsibilities, the Office of Management and Budget and the Bureau of the Census. From this and from additional information supplied by minority group organizations, the Commission ascertained that the scant racial and ethnic data collected by Federal Agencies are insufficient to determine to what degree Federal benefits are reaching minority groups on an equitable basis. This deficiency has created a vacuum in which it becomes impossible to determine if program benefit distribution is free from discriminatory practices.

It is apparent to the Commission that denial of equal opportunity in Federal assistance programs will continue as long as Agencies persist in basing their confidence in the nondiscriminatory character of their programs on *ad hoc* and even haphazard observations. This attitude, stemming from limited knowledge of programs and lack of complaints, is illusory since it contrasts with the harsh facts of institutionalized biases against minorities. The time has long passed when a disregard for racial and ethnic origin can substitute for exact figures and facts.

A system of racial and ethnic data collection must be introduced to assess the adequacy of Federal efforts in providing assistance to minorities by comparing the race and ethnic origin of Federal program beneficiaries with those of persons intended by law to receive such benefits. On the basis of that evaluation, Federal Agencies must set realistic and timely goals for improved program performance, sensitive to the unique needs of every minority group.

We urge your consideration of the facts presented and ask your leadership in developing this new dimension to eliminate discrimination in Federal domestic assistance programs.

Respectfully yours,

Rev. Theodore M. Hesburgh, C.S.C., *Chairman*
Stephen Horn, *Vice Chairman*
Frankie M. Freeman
Maurice B. Mitchell
Robert S. Rankin
Manuel Ruiz, Jr.

John A. Buggs, *Staff Director*

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This report was prepared under the overall supervision of Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation.

INTRODUCTION

In 1970 the U.S. Commission on Civil Rights issued *The Federal Civil Rights Enforcement Effort*, a report which evaluated the mechanisms adopted by Federal Agencies to carry out their civil rights responsibilities. One of the report's principal findings was the paucity of racial and ethnic data to determine whether the program benefits were reaching minority groups on an equitable basis. The Commission noted:

> Virtually every aspect of the Federal civil rights effort has suffered from lack of sufficient data on which to . . . evaluate the impact of existing programs. . . . Thus, access to accurate knowledge of the dimensions of a particular problem or a realistic assessment of the value of newer programs is diminished.[1]

Followup studies have demonstrated only slight improvements in this situation. Meanwhile, it is apparent to the Commission that disparities in Federal assistance continue. Recent court cases, investigations by Federal Agencies and private organizations, and Commission studies and hearings all attest to the pervasiveness of such discrimination.

Federal subsidies for mortgage payments are perpetuating residential segregation.[2] In some States federally financed services to farmers still are provided on a racially discriminatory basis.[3] Health and social services are often inaccessible to minority groups, in many instances because no provision is made for communication with persons who speak little English.[4] Too often highways and other public works are built without considering their effect upon minority communities.[5] In many instances, recreational facilities continue to be segregated.[6]

Consequently, Federal Agencies have a distinct responsibility to insure that discrimination in Federal assistance is abolished. Their *ad hoc* and often passive civil rights enforcement systems have not been sufficiently comprehensive either to measure or to reduce inequitable distribution of Federal assistance. At best, their efforts have been directed at overt forms of discrimination such as explicit denials of assistance because of race and ethnic origin. Agency policies have thus permitted the perpetuation of more subtle forms of discrimination, such as inequitable guidelines and eligibility requirements, irrelevance of program goals to minority needs, and lack of affirmative action to increase minority participation.

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[1] U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort*, at 39, 1970.

[2] E. J. Santos, U.S. Commission on Civil Rights, Hearing at Baltimore, Md., August 1970, at 195, 580-620; U.S. Commission on Civil Rights, *Home Ownership for Lower Income Families*, at vii-ix, 1971.

[3] In *Strain* v. *Philpott*, 331 F. Supp. 836 (M.D. Ala., 1971) the court found that racial discrimination permeated the employment practices and the services distribution of the Alabama Extension Service. See also the U.S. Commission on Civil Rights, *Equal Opportunity in Farm Programs*, 1965, and *Equal Opportunity in the Mississippi Cooperative Extension Service*, 1969.

[4] Report of the Massachusetts State Advisory Committee to the U.S. Commission on Civil Rights, *Issues of Concern to Puerto Ricans in Boston and Springfield*, February 1972, at 55; Japanese American Citizens League, Proposal for a Cabinet Committee for Asian American Affairs, Nov. 15, 1971; Action for Boston Community Development, Inc., *The Chinese in Boston*, 1970; U.S. Commission on Civil Rights, Mexican American Education Study, Report III, *The Excluded Student: Educational Practices Affecting Mexican Americans In The Southwest*, 1972.

[5] *Nashville I-40 Steering Committee* v. *Buford Ellington, Gov.*, 387 Fed 2d 179 (1967); *La Raza Unida, et al.*, v. *Volpe et al.* No. C-71-1166 RFP (U.S. D.C. N.D., Calif. Nov. 8, 1971.) Edgar Cahn, Editor, *Our Brother's Keeper: The Indian in White America*, 1969.

[6] General Accounting Office, Summary of Information Regarding the Association Recreation Loan Program, Farmers Home Administration, Department of Agriculture, transmitted in letter from Elmer B. Staats, U.S. Comptroller General, to Cong. William L. Clay, Aug. 5, 1970; Department of Interior Bureau of Outdoor Recreation, Title VI Compliance Evaluation, Louisiana State Parks and Recreation Commission, transmitted in a letter from Edward E. Shelton, Director, Office for Equal Opportunity, Department of the Interior to Jeffrey M. Miller, Chief, Federal Evaluation Division, U.S. Commission on Civil Rights, Mar. 24, 1972. Cultural and administration barriers, too, often exist for minority group participation. Interview with Iola Hayden, Executive Director, Americans for Indian Opportunity, May 25, 1972.

In the absence of data documenting the discriminatory distribution of Federal assistance, the present situation is likely to continue. In recognition of this fact, some Federal Agencies have recently considered instituting racial and ethnic data systems or strengthening existing requirements. The Office of Management and Budget has begun to study the use of racial and ethnic data by Federal Agencies. To date, however, most Agencies have not developed and executed viable agencywide plans for the collection and use of these data.

Deeply disturbed at the lack of Federal progress made in this crucial field, the Commission concluded it must undertake a study to determine the most effective way to collect and use racial and ethnic data in the context of Federal responsibility to prevent discrimination. Six Federal Agencies administering domestic assistance programs were selected for this study: the Departments of Agriculture (USDA), Health, Education, and Welfare (HEW), Housing and Urban Development (HUD), Labor (DOL), Transportation (DOT), and the Veterans Administration (VA). These Agencies were selected because they are responsible for some of the largest programs of Federal domestic assistance, because they face a wide variety of technical data collection problems, and because they exhibit varying degrees of commitment to the collection and use of racial and ethnic data. Within these Agencies, interviews were conducted with program managers, planning and evaluation staff, legal advisors, budget personnel, reports clearance officers, and equal opportunity officials. Interviews were also conducted with the Office of Management and Budget (OMB) and the Bureau of the Census (Department of Commerce), Agencies with major statistical responsibilities. Finally, discussions were held with private agencies and with minority group spokesmen. Relevant records, directives, legal memoranda, and policy statements were examined.

As the need for racial and ethnic data becomes more apparent and as the technical factors involved in the creation of a system for the collection and use of such data are given more consideration, the issues surrounding the establishment of such a system become increasingly controversial. In issuing this report the Commission recognizes that, while certain of the technical procedures proposed may merit further discussion, it is imperative that Federal Agencies immediately inform themselves of the extent to which their assistance is reaching the minority community.

I. The Use of Racial and Ethnic Data

Racial and ethnic data are essential tools with which to combat discrimination and plan and monitor affirmative action to remedy past racial wrongs. The collection and analysis of these data are the most effective and accurate means of measuring Federal program[1] impact upon minority beneficiaries[2] and for assuring that equal opportunity policies are working effectively.[3]

In Federal programs providing employment assistance, racial and ethnic data are necessary to prove or disprove patterns of discrimination. Data on retirement, hiring, training, salaries, promotions, terminations, and awards must be recorded by race and ethnic origin to determine the extent to which employment opportunities are open to and accepted by minority citizens. In Federal housing programs, racial and ethnic data should be used in conjunction with information on the location, age, condition, financing, and costs of housing. Racial and ethnic data on the rentals or sales by builders and real estate brokers are needed to determine possible discriminatory patterns in the real estate industry. In education programs, data on the racial and ethnic origin of pupils, staff, participants in extracurricular activities, and supplemental programs, and data on the equipment and facilities available to minority pupils are essential for an assessment of equal opportunities. With regard to programs of Federal assistance in general, data on the race and ethnic origin of persons eligible for, applying for, or receiving Federal assistance again are fundamental tools for measuring the extent of equitable distribution of Federal benefits.[4]

In addition to their significance in equal opportunity programs, general purpose racial and ethnic statistics are often indispensable as general background for policy formulation and program planning.[5] For example, statistics on births and immigration by language group are useful for developing and planning training and education programs, hiring bilingual staff members for schools, welfare offices, and health facilities, and publishing information about program benefits for potential non-English speaking beneficiaries. Because of the general utility of such data the United Nations has recommended that in countries with large population groups which have varying social and economic characteristics, the identity of each be maintained in vital statistics.[6]

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[1] The Office of Management and Budget defines "Federal domestic assistance program" as "any function of a Federal Agency which provides assistance or benefits that can be requested or applied for by a State or States, territorial possession, county, city, other political subdivision, grouping, or instrumentality thereof; any domestic profit or nonprofit corporation, institution, or individual, other than an agency of the Federal Government." Office of Management and Budget, Circular No. A-89, Revised, Dec. 13, 1970.

[2] Beneficiaries are those individuals to whom assistance is ultimately provided. A minority group is a group of persons distinguished by race or ethnic origin, who share common ancestry, physical characteristics, cultural background, and experience, and who, because of overt discrimination and institutional barriers, are denied equal access to social, economic, and political opportunities, and/or who continue to suffer the effects of past discrimination.

[3] See J. Leeson, "Records by Race: to Keep or Not," *South. Ed. Rep.*, September 1966; A Mindlin, "The Designation of Race on Color or Forms," *Pub. Ad. Rev.*, Vol. XXVI, No. 2, at 114, June 1966; and H. L. Moon, representative of the National Association for the Advancement of Colored People (NAACP), at the 122nd Annual Meeting of the American Statistical Association, "Selective Race Statistics," *Proceedings of the Social Statistics Section* at 250, 251, 1962. Discussions of the importance of racial and ethnic data are also contained in a memorandum from Alice M. Rivlin, then Assistant Secretary for Planning and Evaluation, Department of Health, Education, and Welfare, and Ruby G. Martin, then Director, Office for Civil Rights, to Wilbur J. Cohen, then Secretary of Health, Education, and Welfare, "Equal Opportunity Goal Setting," Nov. 18, 1968, and in a memorandum from Morton H. Sklar, then Attorney, Title VI Unit, Department of Justice to David L. Rose, then Special Assistant to the Attorney General for Title VI, Sept. 13, 1968. Racial and ethnic data have generally been accepted for the purpose of measuring nondiscrimination in employment. They are collected and extensively utilized by the Federal Agencies with responsibilities for preventing discrimination in this area. See 29 C.F.R. Ch. XIV, Part 1602 (1966), for reporting requirements for private employment and U.S. Civil Service Commission Bulletin No. 291-94 for Federal employment reporting requirements. The significance of and need for racial and ethnic data are also discussed in the U.S. Commission on Civil Rights publications, *The Federal Civil Rights Enforcement Effort*, at 351, 1970; *Equal Opportunity in Farm Programs*, at 111, 1965, and in a report by the Commission appended to *Nutrition and Human Needs*, Hearings Before the Select Committee on Nutrition and Human Needs, of the United States Senate, 90th Cong., 2nd Sess., Part 8, 2693-2707.

[4] Major Federal racial and ethnic data collections relating to the distribution of Federal assistance include HEW data on pupil enrollment and staffing; data on applicants to the State Employment Security Agencies collected by the Manpower Administration of the Department of Labor, and data on the race and ethnic origins of persons interested in and utilizing Small Business Administration minority enterprise programs.

Failure to collect statistics by race has sometimes had unfortunate consequences. In the 1940 census, for example, the Bureau of the Census (BOC) honored a request by the Mexican Government to remove the category "Mexican" as a racial designation in United States statistics. Later, the Mexican Government requested information about Mexicans living in the United States, but since census data had not been enumerated separately for Mexicans, the data requested were unavailable.[7]

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[5] Federal general purpose statistics are collected to increase information in particular areas. They are contrasted with program statistics which are collected in conjunction with, and for, the improvement of administration of particular programs. For a further discussion of the importance of racial and ethnic enumerations in general purpose statistics see, for example, P. Hauser: "On the Collection of Data Relating to Race, Religion, and National Origin", paper delivered at the Institute on the Collection and Use of Data Based on Race, Religion, or National Origin, Nov. 18, 1959.

The largest collector of general purpose statistics on population is the Bureau of the Census. Minority group statistics have been collected in conjunction with the U.S. Census since 1790. At that time, the first census contained population figures on whites, other free males, and slaves. In 1850 data were collected on whites, blacks, and mulattos. In 1860 and 1870 identification was made of Chinese and Japanese, respectively, for the first time. In 1890 American Indians living in Indian territory and on reservations were included in the official population count. In 1910 the first count of Filipinos was made. In 1930 Mexicans were specifically identified under "other colored", but this enumeration was not repeated in 1940. (See Note 7.) In 1950 Spanish surnamed Americans were identified for the States of Arizona, California, Colorado, New Mexico, and Texas. In 1970, the census used the categories of white, Negro or black, American Indian, Japanese, Chinese, Filipino and Hawaiian, and (for the first time) Korean. Detailed forms sent to 5 percent of all households enumerated separately Mexicans, Puerto Ricans, Cubans, Central or South Americans, and other Spanish. See Henry D. Sheldon, "Racial Classification in the Census", *Proceedings of the Social Statistics Section*, Am. Stat. Ass'n. at 254, 1962; P. Hauser, Supra; U.S. Bureau of the Census, U.S. Census of Population, 1960, Vol. I, *Characteristics of the Population*, Part 1. United States Summary, at XLII; and 1970 Census Users Guide, Part I, Bureau of the Census, U.S. Department of Commerce, October 1970.

Despite the identification of these groups in the 1970 census, however, separate data for specific minority groups will be reflected in only a few of the tabulations published in the 1970 *Census of Population*. Further, when minority group data are included in the tabulations, it will most frequently be for blacks, and to some extent also for the Spanish speaking population. U.S. Bureau of the Census, Department of Commerce, Sample Table Outlines for Final Reports PC(1)-A, *Number of Inhabitants*; PC(1)-B, *General Population Characteristics*; PC(1)-C, *General Social and Economic Statistics*; and PC(1)-D, *Detailed Characteristics, U.S. Census of Population: 1970*.

It should be noted that because of its methods of measurement, sampling techniques, and definitions the enumerations of persons of Spanish origin in the 1970 census and other recent counts of this population have generally been regarded by the Mexican American and Puerto Rican communities as inadequate. See letter to John A. Buggs, then Acting Staff Director, U.S. Commission on Civil Rights, from Robert L. Gnaizda, Attorney, Public Advocates, Inc., Oct. 29, 1971; letter to George Hay Brown, Director, Bureau of the Census, Department of Commerce, from Mario Obledo, Executive Director, Mexican American Legal Defense and Educational Fund and Robert L. Gnaizda, General Counsel for the Mexican American Population Commission of California, and Attorney, Public Advocates, Inc. See also interview with Antonia Pantoja, Executive Director, Puerto Rican Research and Resources Center, May 11, 1972.

That the Bureau of the Census statistics are often inadequate and misleading has been a frequent allegation of many other minority groups as well; see, for example, interview with David Ushio, Assistant Washington Representative, Japanese American Citizen's League, May 4, 1972; interview with Alexander McNabb, Director of Engineering and Construction, Bureau of Indian Affairs, Department of the Interior, Mar. 16, 1972; interview with Jack D. Forbes, Professor of Native American Studies, University of California at Davis, Jan. 11, 1972; and Report on Accuracy of the 1970 Census Enumeration; Subcomm. on Census and Statistics of the Comm. on Post Office and Civil Service, H.R. Report No. 91-1777, Ninety-First Congress, 2nd Sess., 1970.

Nevertheless, it is significant that the Bureau of the Census has demonstrated greater concern with minority group statistics in its compilation of population figures than have other general purpose data collection agencies such as the National Center for Health Statistics (HEW), the National Center for Educational Statistics (HEW), and the Bureau of Labor Statistics (DOL), in their compilation of vital, health, social, and economic statistics, respectively.

[6] United Nations, Statistical Office, *Handbook of Vital Statistics Methods*, at 225, April 1955. Vital statistics include statistics on births, marriages, deaths, and divorces.

A. RECOGNITION OF THE NEED FOR RACIAL AND ETHNIC DATA

The importance of the collection and use of racial and ethnic data as a basis for dealing with social problems and for an improved understanding of society has been expressed in formal resolutions favoring the collection of these data passed by the American Public Health Association,[8] the Association of State and Territorial Health Officers,[9] the Population Association of America,[10] and the Social Statistics Section of the American Statistical Association.[11] The American Civil Liberties Union has also recognized the significance of racial and ethnic data for statistical purposes.[12]

Minority groups have increasingly asserted the importance of access to data about themselves, as a basis for dealing with the racial problems which confront them. Mexican Americans, Cubans, and Puerto Ricans have requested statistics on their participation in Federal programs.[13]

Black citizens have noted the value of demographic and social statistics on their population in the United States.[14] Japanese, Chinese, Koreans, Filipinos, and

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[7] Hauser, *supra* note 5. As a result of the Mexican Government's request to remove the designation of Mexican, no separate tabulations on Mexicans were released for the 1930 census although the information had been collected.

[8] The American Public Health Association passed a resolution stating that statistics on race and color are important in public health and social problems and for scientific research. It urged Federal, State, and local health agencies to continue to collect these statistics. Resolution passed by the American Public Health Association, 1962 Annual Convention, "Retaining Race-Color Data on Vital and Health Records", Oct. 17, 1962.

[9] The Association of State and Territorial Health Officers passed a resolution recommending that State and Territorial Health Officers continue to collect vital statistics by race and color and that the confidentially of these data be safeguarded. Resolution passed by the Association of State and Territorial Health Officers, "Designation of Race or Color on Vital Records". *Proceedings of the Association of State and Territorial Health Officers*, 1962.

[10] The Population Association of America at its meeting in Philadelphia, Apr. 26-27, 1963, adopted resolutions urging retention of racial/color designations in vital statistics and in census records. See U.S. Department of Health, Education, and Welfare, Public Health Service, National Vital Statistics Division, *The Registrar and Statistician*, at 27, 28, May 1963.

[11] The Social Statistics Section of the American Statistical Association issued a resolution which cites the importance of race and color classifications in the development of statistical information for public health and social programs, scientific research, and public policy. It urges the continued use of these data for statistical and scientific purposes. "Resolution on Race-Color Designation" submitted by the Social Statistics Section and approved by the Council of the American Statistical Association, Jan. 17, 1964.

[12] The American Civil Liberties Union (ACLU) issued a policy statement to the effect that knowledge of race and ethnic origin is essential in the fight against discrimination, retracting an earlier position which opposed racial and ethnic data collection. The ACLU urged, however, that these data not be collected unless necessary. Policy statement of the ACLU, Jan. 13, 1968.

[13] The Commission's Massachusetts State Advisory Committee found that the lack of adequate data on health, education, and living conditions of Puerto Ricans presented a real barrier to the solutions of the problems of the Puerto Rican community. Massachusetts State Advisory Committee Report to the U.S. Commission on Civil Rights, *Issues of Concern to Puerto Ricans in Boston and Springfield*, February 1972. See also interview with Diana Lozano, Personal Assistant to the Chairman, Cabinet Committee on Opportunities for Spanish Speaking People, Dec. 9, 1971. The Cabinet Committee was instrumental in having a question about persons of Spanish origin included in the 5 percent sample of the 1970 Census of Population. See also letter from Mario Obledo, General Counsel, Mexican American Legal Defense and Education Fund (MALDEF), to Cynthia N. Graae, Federal Evaluation Division, Commission on Civil Rights, Feb. 4, 1972. MALDEF indicates strong support for the collection of racial and ethnic data to determine participation by Mexican Americans, Puerto Ricans, Cubans, and other persons of Spanish descent.

Lack of statistics on health of Spanish surnamed Americans is noted by Arthur E. Raya, Special Assistant to HEW Secretary Elliot T. Richardson (Health Needs of Spanish Surnamed Americans), in "Health Issues Affecting Spanish Surnamed Americans", a paper presented at the Spanish Speaking Coalition Conference, Washington, D.C. Oct. 23, 1971.

[14] The NAACP has expressed the need for many facts relating to blacks which it believes are best collected by the Federal Government, such as number, age, and sex distribution, geographic location, income, occupation, employers, consumer habits, education level, and health status. These needs for the data are shared by the black press and radio. (Moon, *supra* note 3.) Nonetheless, the traditional policy of the NAACP has been one of opposition to racial identification in government of business records. The NAACP has noted that simple assurances of compliance with antidiscrimination requirements are not satisfactory and at this time is reexamining its policy of opposition to racial identifications. (Letter from John A. Morsell, Assistant Executive Director, National Association for the Advancement of Colored People, to Cynthia N. Graae, Federal Evaluation Division, Commission on Civil Rights, Apr. 27, 1972.)

The National Urban League adopted a resolution stating

Samoans have lamented the handicaps which result from the lack of this data on their groups.[15] American Indian organizations and tribes have expressed dismay at inadequate statistics on their population.[16]

The Office of Management and Budget (OMB) has recognized the utility of racial and ethnic data collection in Federal assistance programs, and has noted that "in order to effectively carry out the policy of nondiscrimination it has become necessary for Federal Agencies to obtain considerable information on race."[17] In addition, White House staff has conducted studies of minority involvement in Federal activities and often makes specific requests from Federal Agencies for data by race and ethnic origin.[18]

Secretaries[19] of four of the six Agencies studied in this report have held that such procedures must be initiated if an effective equal opportunity program is to come into being.[20] Their statements set forth

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that, although the League recognized that racial designations in social statistics may be subject to misuse, the value of mass racial statistics outweighs the admitted dangers. Its position is that such statistics should be compiled and reported. The League opposed racial identification on documents such as licenses, certificates, and applications, and urged care in protecting the rights of individuals. Resolution by the National Urban League, Sept. 5, 1962. This remains the policy of the National Urban League. Interview with James D. Williams, Director of Communication, Mar. 17, 1972. See also Dr. G. Franklin Edwards, Howard University, in a paper presented to the meeting of the Population Association of America, Washington, D.C., Apr. 23, 1971.

[16] These groups frequently report that, because of a lack of relevant data, they have been unable to document fully discrimination in employment, education, health, and housing.

> We Asians faced a monumental task in gathering data . . . in that no governmental studies have ever seriously been undertaken to isolate our problems.
>
> * * *
>
> . . . [I]t was frustrating to discover how little pertinent information has been gathered concerning the Asian American problems.

Japanese American Citizen's League, A Brief for a Cabinet Committee for Asian American Affairs, Nov. 15, 1971.

Lack of data on Asian Americans is also noted by Action for Boston Community Development, Inc., *The Chinese in Boston*, 1970, at 24, and letter from L. Ling-chi Wang, Executive Secretary, Chinese for Affirmative Action, to Cynthia N. Graae, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Apr. 20, 1972. See also interview with Toyo Biddle, Coordinator for Asian American Affairs, Department of Health, Education, and Welfare, Nov. 29, 1971. Mrs. Biddle stated that in addition to the lack of data, except for the Bureau of the Census no Federal Agencies have taken the initiative to develop comprehensive socioeconomic profiles on these groups and only limited research has been conducted at the State level. The limited data published by the Bureau of the Census have been insufficient to meet the needs of many Asian American organizations.

See also interview with Robert Llorente, Executive Director, Fil-Am English Language Center, Apr. 19, 1972 and interview with David Ushio, Assistant Washington Representative, Japanese American Citizens League, May 4, 1972.

[16] They contend that school districts and social service agencies serving American Indians do not have sufficient data to provide adequate social services (interview with Jack D. Forbes, Professor of Native American Studies, University of California at Davis, Jan. 11, 1972) and that Federal, State, and local governments need more data in order to develop programs for American Indians (interview with Iola Hayden, Executive Director, Americans for Indian Opportunity, Apr. 19, 1972.)

The great scarcity of statistics on American Indians is reviewed by S. A. Langone, "A Statistical Profile of the Indian: the Lack of Numbers", in *Toward Economic Development for Native American Communities*, a compendium of papers submitted to the Subcommittee on Economy in Government of the Joint Economic Committee, 91st Cong., 1st Sess., 1969. Mr. Langone notes that, under the heading of *Indians of North America* in the Library of Congress Card Catalogue, there are only 16 cards under the subheading of *Statistics* and 11 under *Census*, compared with 103 under the subheading of *Pottery* and 314 under *Legends*.

[17] Office of Management and Budget, Clearance Office Manual, Rev. July 1971. Despite this recognition, OMB has not required that Federal programs collect racial and ethnic data.

[18] E.g., in June 1970, the White House, assisting in the development of a program to increase minority involvement in Federal contracts, asked Federal Agencies for data on the current level of such involvement, data which in many cases did not exist.

[19] Only one of these, George W. Romney (HUD) was still in office in June 1972. Clifford M. Hardin (USDA), Wilbur J. Cohen (HEW), and W. Willard Wirtz (DOL) are no longer members of the Cabinet.

[20] The statements are as follows:

1. Clifford M. Hardin, Secretary of Agriculture, 1968-71, Secretary's Memorandum No. 1662, Sept. 23, 1969. In this memorandum Secretary Hardin enunciated departmental policy on civil rights with regard to racial and ethnic data. He stated that it was crucial for the Department to develop a system of measuring the quantity and quality of services delivered to minority groups in all important and sensitive program areas.

2. Memorandum from Wilbur J. Cohen, Secretary of HEW, 1968-69, to HEW Agency heads, Jan. 17, 1969, "The Collection and Use of Racial or Ethnic Data". Secretary Cohen endorsed the collection and use of racial and ethnic data as a "vital tool" for determining whether HEW programs are reaching the intended beneficiaries and for fulfilling the congressional mandate of nondiscrimination in federally assisted programs.

3. Memorandum from George Romney, Secretary of

Agency policy regarding collection of racial and ethnic data to execute departmental civil rights responsibilities. They also discuss necessity to know if Agency programs are reaching intended minority beneficiaries and to learn of the quantity and quality of the benefits reaching those being served.

Not all Federal Agencies have endorsed the collection of racial and ethnic data. Of the Agencies studied, neither the Department of Transportation [21] nor the Veterans Administration [22] has set down policies requiring the agencywide collection of racial and ethnic data on beneficiaries of Federal assistance programs. Nor have they informed program managers of official support for their collection. Even within the Agencies endorsing racial and ethnic data, many programs have not established adequate collection systems.[23]

Although some program officials may indicate that they do not collect racial and ethnic data because it would be detrimental to potential minority beneficiaries, they may, in fact, hide behind this statement in order to avoid self-evaluation. Without such racial and ethnic information, it is difficult for any Agency to assess systematically the extent to which there is discrimination in its assistance programs. Thus, the possibilities of instituting new practices to improve the distribution of assistance to minority beneficiaries are not explored. Without racial and ethnic data an Agency is incapable of assessing equality in the distribution of benefits.

Absence of such data makes it difficult for investigators from within or outside of the Agency or program to uncover any discrimination within the program. The apparent hypocrisy of program officials who frown upon the collection of racial and ethnic data was noted by W. Willard Wirtz when he was Secretary of Labor:

> I am sick and tired, furthermore, of the false piety of those who answer inquiries about the racial aspects of their employment or membership practices with the bland, smug answer that: "We don't know because of course we wouldn't keep records on anything like that." [24]

B. FEDERAL AGENCY USE OF RACIAL AND ETHNIC DATA

The questions of whether or not racial and ethnic data should be collected and how they can best be collected are able to be resolved only by knowing

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Housing and Urban Development, to all HUD Assistant Secretaries and the General Counsel "Collection of Racial and Ethnic Data", Apr. 8, 1970. Secretary Romney stated that it is impossible to carry out civil rights responsibilities affirmatively without information on the racial and ethnic composition of applicants for, and recipients of, HUD assistance. He also indicated that such information could be of use in dealing more effectively with complaints received by the Agency. He directed that a uniform data collection system be implemented by all HUD assistance. He also indicated that such information could be of use in dealing more effectively with complaints received by the Agency. He directed that a uniform data collection system be implemented by all HUD programs.

[20] W. Willard Wirtz, Secretary of Labor, 1962 to 1968, address at the Convocation of the NAACP Legal Defense and Education Fund, New York, N.Y., May 18, 1966. Secretary Wirtz described the civil rights responsibilities of his Agency and the resulting need to know the racial distribution of participants in Manpower Administration programs. He announced that inclusion of racial identifications on employment records subject to the control of the Department of Labor would henceforth be required whenever this was necessary or helpful in combating racial discrimination and in promoting affirmative action programs.

[21] The only policy regarding the collection of racial and ethnic data at the Department of Transportation is in connection with the implementation of equal housing opportunity requirements for persons relocated because of departmental activity. DOT requires the collection data on whites and nonwhites who are relocated. (These categories will probably be expanded to Negro/Black, Spanish Surnamed, American Indian, Asian American, and all others with the issuance of an Office of Management and Budget Circular concerning annual reporting under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91-646.)) The Department of Transportation does not require the collection of racial and ethnic data on the participants and users of its principal programs of assistance as, for example, users of highways or airports. Interview with Robert Coates, Program Manager, Office of Civil Rights, Department of Transportation, Aug. 31, 1971.

[22] The Veterans Administration has no policy requiring the collection or use of racial and ethnic data; its only regulations affecting this collection and use are those which prohibit the public release of medical information on individuals. Interview with Dan R. Anders, Assistant Director for Construction and Title VI Compliance, and other Veterans Administration staff, Veterans Administration, Aug. 3, 1971.

[23] The failure of Federal programs to collect racial and ethnic data and the adequacy of existing collection systems are discussed in Section II of this report.

[24] W. Willard Wirtz, address at the Convocation of the NAACP Legal Defense and Education Fund, *supra* note 20. See also memorandum from Thomas McFee, Deputy Assistant Secretary for Program Systems, to HEW Program Planning and Evaluation Staff, "Collection of Racial/Ethnic Data", Sept. 14, 1970. Mr. McFee noted that "color blindness" would no longer be tolerated in data collection.

the uses to which the data will be put.[25] Despite this fact, even those Federal Agencies requiring such data collection have given little consideration to the questions of *who* should use these data and *how* they should be used.

Agencies have provided little guidance to civil rights and program officials for tabulating, analyzing, and interpreting data. No agencywide directives have indicated the breakdown of this responsibility among the recipients [26] of Federal programs, Federal program officials, and departmental civil rights specialists. Agency officials in charge of activities such as program planning, evaluation, research, or civil rights compliance have not been directed to make the analysis of racial and ethnic data an integral part of their responsibilities.

Thus, data on the dollar outlays of HEW programs by the race and ethnic origin of the beneficiaries are reported annually to the Department's Office of the Assistant Secretary for Planning and Evaluation. Program officials, however, have not been instructed to analyze and evaluate the data submitted, nor has this responsibility been assumed by the Office for Civil Rights.[27]

Even more significant, however, is the fact that there has been no instruction indicating what should be measured with the data collected. Although there is no doubt that racial and ethnic data are in general intended to measure the extent of nondiscrimination in Federal programs and the extent to which program benefits are distributed equitably, there have been few official suggestions about how these data might be used to locate possible sources of discrimination.

USDA and HUD policies have incorporated only general directives for the use of racial and ethnic data, merely stating broadly that this data collection is required to fulfill civil rights responsibilities dictated by legislation and Executive orders.[28] Program officials have not been instructed to examine the extent to which minorities are applying for Federal assistance, the extent to which their applications are being accepted, or the extent to which minorities participating in Federal programs are receiving equitable treatment. There have been no instructions with regard to the criteria which should be used for making such analyses.

Only one Agency studied provided concrete suggestions with regard to what should be measured with racial and ethnic data. Former Secretary of Health, Education, and Welfare, Wilbur Cohen, directed that the use of racial and ethnic data reflect

> . . . underutilization of program services or facilities by minority groups, differential treatment in services offered to minority groups, and failure to achieve program goals with respect to minority groups who participate.[29]

Unfortunately, this directive was issued only a few days before Mr. Cohen left HEW and his instructions for the collection and use of these data have never been carried out.[30] Because agencywide policy has been addressed primarily to the collection rather than to the use of racial and ethnic data, at HUD and USDA the principal accomplishments in establishing data systems have been toward insuring data collection.[31] Simarily, at HEW, Agency efforts have been to establish data reporting by program officials to the Office of Planning and Evaluation, rather than to make plans for data to be analyzed. Only the Department of Labor of the Agencies studied has established and implemented a system for using the data it collects.[32]

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[25] The collection of racial and ethnic data has been upheld by courts where a valid use, such as the measurement of minority participation, has been demonstrated and prohibited where the purposes of data collection were not in the public interest such as in establishing discriminatory classifications. See *Hamm* v. *Virginia State Board of Elections*, 230 F. Supp. 156 (E. D. Va. 1964) *aff'd sub nom. Tancil* v. *Woolls*, 379 U.S. 19 (1964); *United States* v. *Montgomery County*, 289 F. Supp. aff'd 37 LW 4461 (1969); *Green* v. *New Kent Co.*, 391 U.S. 430 (1968); *Wanner* v. *County School Board of Arlington County*, 357 F. 2d 452 (1966); *Norwalk CORE* v. *Norwalk Redev. Auth.*, 395 F. 2d 920 (1960); *Gautreux* v. *Chicago Housing Authority*, 296 F. Supp. 967 (1969); *Gaston County, N.C.* v. *United States*, 288 F. Supp. 678 (D.C. D.C.) aff'd 395 U.S. 285 (1969); *United States* v. *Louisiana*, 380 U.S. 145 (1965); *United States* v. *Medical Society of South Carolina*, 298 F. Supp. 145 (U.S. D.C. S.C. 1969).

It is, therefore, essential that any racial and ethnic data collection system begin first with valid designs for the use of those data. An attitude which permits the collection of vast amounts of unused racial and ethnic data could hardly be compatible with the necessary vigilance to insure against misuse. Collection of racial and ethnic data without a specific plan for their use would be valueless.

[26] Regulations to implement Title VI of the Civil Rights Act of 1964 define a recipient as:

> Any State, political subdivision of any State or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assignee or transferee thereof, but such term does not include any ultimate beneficiary under any such programs. 45 C.F.R. 80.13 (i) 1964.

These regulations are similar to all other Agency Title VI regulations.

[27] Interview with John Hope II, Assistant Director for Planning, Office for Civil Rights, and HEW staff, Department of Health, Education, and Welfare, Aug. 12, 1971. As of May 1972 this situation remained unchanged. Interview with Sandra R. Clark, Program Analyst, Office of the Assistant Secretary for Planning and Evaluation, HEW, May 15, 1972.

[28] Hardin memorandum, *supra* note 20 and Clifford M. Hardin, Secretary's Memorandum No. 1662, Supplement No. 1, Department of Agriculture, July 27, 1970; Romney memorandum *supra* note 20, and 36 Fed. Reg. 10782, June 3, 1971.

[29] Cohen memorandum, *supra* note 20.

Racial and ethnic data can and should be used at several points in the process of distribution of Federal assistance. They may be used by recipients of Federal assistance, both in making applications to show the possible effect of the proposed project [33] on minority beneficiaries and in examining the extent of nondiscrimination in the distribution process. They may be used by Federal program managers and by Agency planning and evaluation offices for program development and for assessment of the extent to which Federal programs are meeting their stated objectives. They are also essential to other Agency units such as the civil rights office for the purposes of compliance review or complaint investigation, or to administrative offices for appraising overall allocation of resources, formulating requests for additional appropriations, and drafting legislation. Racial and ethnic data should also be used by the Office of Management and Budget in its assessment of the effectiveness of distribution of Federal funds and in an overall evaluation of Federal programs.

1. RECIPIENTS OF FEDERAL ASSISTANCE

Responsibility for nondiscrimination in Federal programs extends to the recipients of these programs,[34] who often have the ultimate responsibility for collecting racial and ethnic data. Thus, when a recipient of Federal assistance states that the facility or activity receiving assistance is operated on a nondiscriminatory basis, data should be available to support that statement.[35] When a recipient is informed of standards for reaching minority beneficiaries which he is required to meet, he should be able to measure the extent to which he meets those standards.

There is precedent for data analysis at the State level. Data submitted to Federal Agencies by State agencies are frequently computerized by the States for their own analyses.[36] Data collected by the State employment security agencies funded by the Department of Labor are analyzed by some States to determine the extent to which minority applicants to the state employment service are accepted for employment.[37]

Recipients of Federal assistance may also be required to conduct evaluations of projects to determine if the funded project meets program objectives or if particular techniques for meeting these objectives are successful. This requirement is frequently required for experimental projects, such as some of those funded under Title I of the 1965 Elementary and Secondary Education Act.[38]

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[30] Memorandum from Fred Virkus, Program Analyst, Office for Civil Rights, Department of Health, Education, and Welfare, to Morton H. Sklar, Attorney, Title VI Section, Civil Rights Division, Department of Justice, "Racial Data Material", Mar. 25, 1971.

[31] Interview with Percy R. Luney, Chief, Program Evaluation Unit, Office of Equal Opportunity, Department of Agriculture, July 27, 1971. Interview with Laurence D. Pearl, Acting Director of Equal Opportunity for Mortgage Credit Federal Housing, and staff, Department of Housing and Urban Development, Sept. 16, 1971.

[32] See interview with Arthur Chapin, Director, Office of Equal Opportunity in Manpower Programs, and Manpower Administration staff, Department of Labor, Sept. 17, 1972. No specific instructions for data use were included in the announcement of departmental collection policy. See Wirtz, address, *supra* note 20; Department of Labor, Manpower Administration Orders 10-66, (Aug. 19, 1966) and 18-71 (July 20, 1971).

[33] A project is a particular activity or facility administered by a recipient of Federal assistance.

[34] When Federal assistance is supplied through a recipient, the assistance is conditional upon the signing of assurances by an applicant that the activity or facility to be benefited will be operated without discrimination. While the content of Title VI (of the Civil Rights Act of 1964) assurances varies from Agency to Agency, the assurance is essentially a promise to comply with Title VI regulations and to take immediate steps to achieve compliance.

[35] For example, applicants to the Urban Mass Transit Administration (DOT) which supplies assistance to State and local governments for the planning, development, and financing of improved mass transportation systems, and applicants to several HUD Community Development programs such as Model Cities, Water and Sewer Grants, and Public Facilities Loans, are required to submit demographic maps indicating the racial and ethnic composition of the affected areas. Interview with Harold Williams, Director, Office of Civil Rights, Urban Mass Transit Administration, Department of Transportation, Sept. 13, 1971.

[36] Several State agencies have computerized enrollment data submitted to the HEW Office for Civil Rights and data collected for the Extension Service (USDA) is computerized by several States.

[37] Chapin interview, *supra* note 32.

Where project reports include data which relate to the participants of the program, e.g., school children or trainees, and give information such as the number of persons participating or the results of a particular training program, the separate enumeration of these data for each racial or ethnic group should be required. Such data would have particular significance to the Federal Agency program office in planning future programs.

2. FEDERAL AGENCIES

a. Compliance Reviews

Compliance reviews are periodic, onsite reviews of activities or facilities receiving Federal assistance to determine if their operations are nondiscriminatory and in compliance with Title VI of the Civil Rights Act of 1964. Preaward or pregrant reviews are conducted prior to the award of Federal assistance, and postaward reviews are conducted afterward.

Federal Agencies rarely have sufficient staff to conduct compliance reviews on every recipient or potential recipient of Federal assistance. Consequently, such reviews are typically done for only a small proportion of recipients,[39] and Federal Agencies achieve only limited familiarily with recipient's operations. Thus, racial and ethnic data may play an important role in three phases of the review process. They may be used in determining which recipients should be the subject of a compliance review; used as a basis for the findings of that review; and used as a means of establishing goals and timetables for affirmative action.[40]

In the Agencies studied, only HEW conducted large scale racial and ethnic surveys in conjunction with assessment of civil rights compliance. These covered, for example, hospitals, extended care facilities, and elementary and secondary schools[41] and have served as a basis for identification of recipients whose Title VI status was not questionable.[42]

Compliance reviews, whether conducted as preaward or postaward reviews, involve the examination of pertinent records, the interview of witnesses, the review of relevant statistical data, and the personal observations of the compliance officer. Statistical data may provide information about the race and ethnic origin of the population to be served, applicants, and beneficiaries. They may also assist in documentation of any differentials in benefits or service provided to minority group beneficiaries, and in documentation of the impact of the recipients' operation on minority beneficiaries.[43] Such data may provide *prima facie* evidence of discrimination, or lack of it,[44] or may be used as the basis for further investigation.

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[38] This Title (20 U.S.C. Sec. 241a), administered by the Office of Education (HEW), provides funds to State departments of education for children from economically disadvantaged homes. Funds are generally used for improvement of basic skills, such as reading or arithmetic, through the acquisition of additional staff members, facilities, or materials. Federal funds are thus used in a variety of ways, including individualized instruction, audio visual equipment, teachers' aides, and instructional materials. Evaluation reports are required by the Office of Education from each State. There is no general requirement, however, that the evaluations treat project results separately by racial and ethnic origin.

[39] For example, in Fiscal Year 1971, HEW conducted more than 1,300 compliance reviews of health and social service facilities. This represents less than 10 percent of those facilities subject to Title VI. The Farmers Home Administration (USDA) reviewed only 154 of its more than 6,700 recipients in the last half of Fiscal Year 1971.

[40] Without recourse to statistics on race and ethnic origin, reports written by recipients would be unlikely to contain sufficient information about service to minority beneficiaries. Onsite inspection would require many more man hours than review of statistical data. Complaints do not generally reflect nondiscrimination and, therefore, are a weak basis for compliance review. Reliance upon general knowledge of program operations does not provide systematic information about the extent to which recipients are serving minority beneficiaries.

[41] E.g., "Report of Title VI Civil Rights Compliance Survey of Hospitals and Extended Care Facilities—1969", Office for Civil Rights, Office of the Secretary, Department of Health, Education, and Welfare, Nov. 9, 1970 and Department of Health, Education, and Welfare, *Directory of Public Elementary and Secondary Schools in Selected Districts, Fall 1969.* Similar surveys were also conducted in 1967 and 1970.

[42] Facilities which reported statistics indicating noncompliance with Title VI were then more intensively reviewed. Reliance upon complaints, general knowledge of discriminatory conditions in the past, or newspaper articles may often serve as a basis for selecting recipients for review. Such mechanisms, however, cannot provide adequate information about all recipients.

[43] For example, the *Report of the Office of Equal Employment Opportunity*, Manpower Administration, Department of Labor, Nov. 1, 1967, to Dec. 31, 1970, indicated that minority applicants to State employment services were listed as qualified for employment which did not fully reflect their education, skills, and experience; in fact, job referrals were sometimes irrelevant to those criteria. The report also stated that minority applicants were referred only to certain employers, and that minority applicants were not referred to all training programs for which they were qualified.

b. Program Planning and Evaluation

Program planning includes the establishment of program objectives and the allocation of adequate resources to attain them. It requires that the needs of particular minority groups be evaluated for appropriate program design.

For example, in planning and establishing a given number of new hospitals throughout the country attention must be given to locating a certain proportion of these in minority group communities or in other areas which will be easily accessible to minorities. Included in the objective of the control of genetic disease must be the control of those diseases affecting particular racial and ethnic groups, such as sickle cell anemia, trachoma, Tay-Sachs disease, and Thalessemia.[45]

Resources must be allocated to insure that Federal programs will meet the needs of all racial and ethnic groups. An objective of improved urban mass transportation, for example, can only be accomplished if the system adequately serves minority citizens; i.e., there should be no discrepancy between the age and condition of buses or subway cars used in minority and majority neighborhoods; adequate maintenance of passenger facilities in terminals in minority neighborhoods must be the equivalent in upkeep to those in majority neighborhoods; planning should insure that scheduling and routing are commensurate with the requirements of minority neighborhoods.

In planning a program, data identifying minority group persons is essential. For example, maps showing the location of concentrations of minority residences and businesses can be used in planning urban renewal, urban transit systems, and highways so that the benefits of these programs accrue equitably to minority groups and their disadvantages will not be disproportionate.[46] Similar information can be used in planning the location of clinics and welfare offices.

Program managers are responsible for informing themselves of the status of program performance. The usual method of doing this is through evaluation.[47] Evaluation can generally be defined as the measurement of program performances against a set of criteria. It encompasses a wide variety of activities including research, onsite inspections, surveys or reports;[48] its emphasis may be national or local.

Program evaluations are of two types. These are impact evaluations, to determine the extent to which programs are successful in achieving basic objectives, and strategy evaluations, to determine the effectiveness of specific techniques for carrying out a program.[49] Racial and ethnic data collection and analysis should be an essential element in each type of evaluation.

Whether or not a program is successful in meeting its basic objectives[50] may depend upon the racial or ethnic composition of its beneficiaries. In evaluating impact, a program may be shown to have a good record in meeting such broad goals as health improvement or job placement for the majority of program participants. But unless impact is examined by race and ethnic origin, it cannot be ascertained if the record is representative of services for all racial and ethnic groups.[51] Conversely, results of program evaluation may demonstrate an overwhelming failure in meeting program objectives, despite success in these areas with regard to particular racial or ethnic groups.

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[44] See, for example, *Morrow v. Crisler,* C.A. No. 4716 (S.D. Miss. Sept. 29, 1971) in which the court held that:

> Where the statistical disparities are great, it is unnecessary in establishing a *prima facie* case of racial discrimination that there be shown a conscious or intentional failure by the defendant officials to carry out the duties of their office or that the officials consciously and intentionally discriminated or acted from ill will or evil motives or that they lacked good faith.

citing as authority: *Turner* v. *Fouche*, 396, 90 S. Ct. 532, 24 L. Ed. 2d 567 (1970); *Salary* v. *Wilson*, 415 F. 2d 467 (C.A. 5, 1969), *cert. den.* 397 U.S. 907, 928 (1970).

[45] Sickle cell anemia is a hereditary blood disease that primarily afflicts black children. It produces sickle shaped blood cells with a reduced ability to carry oxygen. Trachoma is a parasitic disease which can cause blindness and which affects many American Indians in the Southwest. Tay-Sachs disease is a fatal and inherited illness characterized by mental and visual impairment, found chiefly in infants and children of Eastern European Jewish extraction. Thalessemia is a blood disease often affecting persons of Italian and Greek descent.

[46] Such maps are currently required in applications for projects made to the Urban Mass Transit Administration (DOT) and to Community Development programs at HUD, although there is no requirement that these maps reflect the location of racial and ethnic groups separately.

[47] Focus on program evaluation is relatively recent. The concern of Federal Agencies has been more on insuring that dollars allocated for particular purposes are spent as intended. Recipients have been more concerned with ascertaining the eligibility of applicants than with determining program impact on beneficiaries. See J. Wholey, *Federal Evaluation Policy*, 1971. Program evaluation may be conducted by the program staff or the Agency office for planning and evaluation and in some instances may be performed by a contractor.

[48] *Id.*, at 23. An operational description of program evaluation is that it "1) assesses the *effectiveness* of an *ongoing* program in achieving its objectives, 2) relies on the principles of research design to distinguish a program's efforts from those of other forces working in a situation, and 3) aims at program improvement through a modification of current operations."

[49] Similar functions have been outlined in the Office of Economic Opportunity Instruction 3300-1, Mar. 6, 1968. A third type of evaluation is project evaluation: monitoring of the activities of particular recipients of Federal funds. This type of evaluation is essentially a management tool, to insure that resources have been allocated as planned and that projects are effectively administered.

Among the administrative goals of all programs should be nondiscrimination in their distribution. If a program is administered in such a way that it discriminates according to race, color, or national origin, it is violating Federal law; it is a program manager's responsibility to be informed of this and to insure an end to the discrimination. Moreover, the effective administration of Federal programs is closely dependent upon nondiscrimination. In programs charged with providing assistance to all eligible beneficiaries, such as Social Security (HEW) and the Veterans Administration pension programs, good administration demands that service be extended to all potential beneficiaries.[52] Even in programs with budget authorizations which permit assistance only for a proportion of persons who meet stated eligibility requirements,[53] failure to serve eligible minority beneficiaries on an equitable basis indicates poor program administration.[54] Program managers should be required to demonstrate, with racial and ethnic data, nondiscrimination in program performance.

In the evaluation of the effectiveness of various techniques or strategies which are used to meet the objectives, it is also important to consider the race and ethnic origin of the beneficiaries. Success of particular techniques may vary for different racial and ethnic groups.[55] Without a racial and ethnic

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[50] Program objectives are the broad, long range purposes of a program, such as increasing the national supply of trained scientists, improving school library resources, or encouraging development of new communities.

[51] The United States Employment Service (DOL) may have a rate of success in total job referrals which is higher than for a particular minority group. Such a finding might be more or less true of particular State employment agencies. A program, for instance, which offers life insurance to veterans may not attract all minority groups or may not provide services which meet minority group needs adequately. These problems may be characteristic of an entire program or may be characteristic only of particular projects within it.

A recreation center with facilities for sports such as skiing or tennis, requiring expensive equipment, might attract fewer minority teenagers than would a center with facilities for group sports such as basketball or swimming. Community health clinics may serve to combat and reduce disease in general, but their existence will have little effect on those groups which tend not to participate in the health programs because of conflict between clinic hours and employment responsibilities, lack of transportation, and language barriers.

A program to reduce the lead pollution in city air might achieve an acceptable reduction in pollution for the total population but might not produce an acceptable reduction for blacks with the sickle cell trait. There are indications that persons with sickle cell anemia can get lead poisioning with lower levels of lead in the bloodstream than those who do not have the disease. They are also exposed to a greater risk with the current levels of lead from automobile exhausts in cities such as Los Angeles, New York, and Washington, D.C. Interview with Daniel B. Fisher, Ph.D., Metropolitan Washington Coalition for Clean Air, May 22, 1972.

[52] The Urban Mass Transit Administration (DOT) provides assistance to urban transportation systems. If resulting systems did not provide adequate service to minorities, the program would be failing to meet its objective of improving in urban development and providing adequate public transportation for all segments of society.

[53] Programs to insure loans for housing, education, or business, for example, may resort to serving applicants on a first come first served basis. Standards for application acceptability may also be raised as the number of applications increase or as authorizations are decreased.

[54] For example, in cases in which the HUD subsidies of the interest paid on home mortgages by lower-income families serve to perpetuate or exacerbate existing patterns of residential segregation, as found by this Commission, the program is not fully meeting the objectives of making adequate housing available to low-income families. (See U.S. Commission on Civil Rights, *Home Ownership for Lower Income Families*, at vii-ix, June 1971).

[55] Success of techniques used in a program for job placement may well differ for various racial and ethnic groups. Traditional screening techniques such as IQ and aptitude tests often are not valid for minority applicants. Available data demonstrate that minority applicants perform less well than whites on standardized aptitude tests. See Cooper and Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 *Harv. L. Rev.*, 1598, 1638-1641 (1969).

Jean J. Couturier, "Court Attacks on Testing: Death Knell or Salvation for Civil Service Systems?" *Good Government*, Vol. LXXXVIII, No. 4, at 10-12, (1971) and J. James McCarthy, "The Meaning of the Griggs Case in the Federal Service", *Good Government*, Vol. LXXXVIII, No. 4, at 8-11 (1971). See also Equal Employment Opportunity Commission, *Personnel Testing and Equal Employment Opportunity*, at 1-5, 22, 23, 37, 1970.

An effort to increase appeal of the national parks by focusing on local American Indian history and utilizing comparison of program strategies, significant discrepancies in the value of the services provided each group could result. Techniques judged as highly successful may be mistakenly assumed to have applicability to all racial and ethnic groups.[56] Only the presentation of results for each racial and ethnic group involved can actually determine the effectiveness of a given program technique.

Goals and timetables are tools to remedy inequities in the distribution of Federal assistance and must become an integral part of Federal programs.[57] They serve a dual purpose: to correct defects in program administration and to eliminate overt discrimination. Appropriate and realistic goals are generally defined in terms of the number of minorities to be served. Data on the racial compositions of both the target population and program participants must be examined to determine the extent of minority underrepresentation. The program is then committed to achieving equitable racial and ethnic representation within a given time period.

The concept of goals and timetables has been accepted by many Federal Agencies for improvement in minority employment,[58] but generally has not yet been incorporated in program planning.[59] Neverthe-

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Native American consultants and guides, might increase the relative frequency of visits by American Indians to national parks, but might not result in any substantial overall increase in visits to national parks.

Techniques for improving high school preparation for college might be generally successful, but because of the high dropout rate of students of a particular minority group, success might be minimal for them. The Bureau of the Census reports that of the white population 25 years old or older in March 1971, 4.1 percent had less than 5 years of schooling and 58.6 percent had 4 years of high school or more; for blacks, these figures were 13.5 percent and 34.7 percent for under 5 years of school and 4 years or more of high school, respectively. For Mexican Americans, these figures were 25.7 percent and 26.3 percent, and for the Puerto Ricans, 23.7 percent and 19.8 percent, respectively. U.S. Bureau of the Census, *Current Population Reports, Population Characteristics, Selected Characteristics of Persons and Families of Mexican, Puerto Rican, and Other Spanish Origin: March 1971*, Series P-20, No. 224, October 1971, Table 10, at 12. Data for Asian Americans and American Indians have not yet been published by the Bureau of the Census.

The Commission has discussed "holding power", or the ability of the schools to hold its students until they have completed the full course of study in *The Unfinished Education*, Report II, Mexican American Education Study, at 70, 1971, and the forthcoming staff report, presented at the Commission's hearing in New York City, *Demographic, Social, and Economic Characteristics of New York City and the New York Metropolitan Area*, 1972, Appendix C.

Similarly, a strategy for improving reading achievement such as remedial reading might be successful with English speaking majority children, but unsuccessful with non-English speaking children who might best profit from a bilingual approach to language education. See, for example, U.S. Commission on Civil Rights, Mexican American Education Study, Report III, *The Excluded Student: Educational Practices Affecting Mexican Americans in the Southwest*, at 21-29, 48 1972.

[56] Improvement in nutrition may result from the distribution of surplus food by the Department of Agriculture, but if the food distributed is unfamiliar to a particular racial or ethnic group, it may not be eaten and, thus, no nutritional gains are derived from it.

[57] An analysis of those situations which warrant the setting of goals and timetables and the standards for those goals is not within the scope of this report. It is important to note, however, that numerical goals and timetables are not the only remedies for minority underrepresentation. Affirmative action may also be necessary to do such things as develop public information programs so that knowledge of Federal benefits reaches potential minority beneficiaries; hire service workers with indepth understanding of the needs and problems of particular minority groups; and construct Federal programs so that the particular benefits offered become more relevant for each racial and ethnic group. The success of such steps must be measured by the amount of change in minority participation by race and ethnic group.

[58] In 1970 the Office of Federal Contract Compliance issued regulations for affirmative action programs for Federal contractors. These require that "an acceptable affirmative action program must include . . . goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies . . . [in] . . . the utilization of [minority groups]. . . ." 41 C.F.R. § 60-1.40 as amended 41 C.F.R. § 60-2.10 (December 1971). In mid-1971, the Civil Service Commission sent a memorandum to the heads of all Federal Departments and Agencies on the use of employment goals and timetables in their equal opportunity programs. It defines a goal as a "realistic objective which an Agency endeavors to achieve on a timely basis within the context of the merit system of employment", and states that goals and timetables should be established where they can contribute to necessary progress in equal employment. Memorandum from Robert E. Hampton, Chairman, Civil Service Commission to heads of Departments and Agencies, "Use of Employment Goals and Timetables in Agency Equal Opportunity Programs", May 11, 1971. Reprinted in U.S. Civil Service Commission, *Minority Group Employment in the Federal Government, Nov. 30, 1970*, at 5-8 (1971). Courts, too, have upheld the setting of goals and timetables to remedy the underutilization of minority workers. *Contractor's Association of Eastern Pennsylvania* v. *Shultz*, 442 F. 2d 159 (3rd Cir. 1971).

[59] The Department of Agriculture is a recent exception to this statement. On May 18, 1972, recognizing that progress in USDA's delivery of program benefits to minority group persons has been inadequate in some USDA programs, Secre-

less, it is a concept which is appropriate and necessary for use in assistance programs. It could be employed by program managers to improve performance of particular recipients or by the Agency or Office of Management and Budget to improve overall program performance.

3. PRIVATE GROUPS AND ORGANIZATIONS

Racial and ethnic data collected by Federal assistance programs are of additional value when they are made available to private groups, research organizations, and universities. Examination of the equitable and nondiscriminatory distribution of Federal benefits may sometime be supplemented by the investigation of such private organizations. These organizations may have insights and sensitivities which are lacking in the Federal bureaucracy. In addition, nongovernmental agencies can evaluate a program without the defensiveness which so often permeates the efforts of Federal program managers.[60] For example, it may take an organization familiar with and interested in minority groups to awaken a community to a lack of social service workers who are aware of the special needs of minority group members. Such organizations often lack the resources to obtain data on the distribution of Federal benefits to minorities. Given access to adequate racial and ethnic information, however, they can provide Government Agencies with valuable additional facts about the status of nondiscrimination in Federal programs.

Data might be made available to these groups in the form of raw statistics,[61] so that private organizations can do their own evaluations. This could result in more detailed tabulations than routinely published by an Agency and in new analyses not hitherto conducted by them.[62] In the course of this study, however, no such use of Federal racial and ethnic statistics by private groups was found.

When these data are made available to private groups, they are most frequently in the form of aggregate statistics. Sharing of such statistics can be increased when Federal Agencies publish these data. Two of the Agencies studied currently publish racial and ethnic data regarding participation in a variety of Agency programs and a third Agency is now planning to do so.[63] The Department of Labor publishes some racial and ethnic statistics in the *Manpower Report of the President*.[64] The Department

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tary of Agriculture, Earl L. Butz, issued a memorandum requiring all USDA Agencies with Title VI or direct assistance programs to

> [I]ncorporate targets for the delivery of prorgam benefits to minority groups into their advance program planning procedures . . . [in order to] . . . (1) promote parity of participation by minority groups . . . and (2) provide approved targets against which participation can be measured.

See Department of Agriculture Secretary's Memorandum No. 1662, Supplement 5, "USDA Policy on Civil Rights", May 18, 1972. While several other Federal Agencies have applied these concepts in the area of employment, it is believed that the Department of Agriculture is the first Agency to have taken this important step in Federal assistance programs.

[60] See, for example, National Indian Leadership Training Program report on Indian school fund abuse. This organization has done extensive research on cases in which funds appropriated for the education of American Indian children under the Johnson-O'Malley Act (25 U.S.C. Sec. 452-455 1936) were not reaching the intended beneficiaries because the funds were either not earmarked by the schools for special Indian programs or because, when the funds were properly allocated, other funds, such as those administered under Title I of the 1965 Elementary and Secondary Education Act, were withdrawn. See also NAACP Legal Defense and Education Fund Report on Indian School Fund abuse, Jan. 12, 1971. The NAACP has uncovered inequities in municipal services, see *Hawkins, et al. v. Town of Shaw, Mississippi*, 437 F. 2d 1286 (5th Cir. 1971), *aff'd en banc*, Mar. 27, 1972. The American Friends Service Committee uncovered racial prejudice and bias in the practices of the Farmers Home Administration in Florida (Rural Housing Alliance, *Bad Housing in America: Abuse of Power*, 1971.) In Alabama, the NAACP Legal Defense and Education Fund, together with the Department of Justice, uncovered discrimination in the Alabama Cooperative Extension Service; see *Strain v. Philpott*, 331 F Supp. 836 (M.D., Ala., 1971). The role of the Federal Government in creating one recently all-white community in California was explored by the National Committee Against Discrimination in Housing, *A Study of Patterns and Practices of Housing Discrimination in San Leandro, California*, May 1971.

[61] Raw statistics are the untabulated data actually collected. In the case of Federal programs, raw data will often be provided by recipients or individual beneficiaries.

[62] Such analyses might uncover correlations and patterns not discovered by program officials. Private groups might be able to devote greater time and resources for statistical analysis. It would be imperative that data sharing did not in fact reveal the identity of particular individuals and that, where necessary, this process provided safeguards for the rights of individuals.

[63] Other Agencies sometimes publish data on isolated programs. For example, HEW publishes data on white and black Social Security beneficiaries in the *Social Security Bulletin*.

[64] Racial and ethnic data inthis report include white and black participants in total Manpower Programs from 1963 to 1970, Spanish descent participants in on-the-job training, and participants in the Neighborhood Youth Corps (white, black, American Indian, Asian American, and other). Department of Labor, *Manpower Report of the President*, April 1971.

of Agriculture has issued a major publication devoted entirely to the presentation of racial and ethnic data, *Participation in USDA Programs by Ethnic Groups,* issued in July 1971.[65] The Department of Housing and Urban Development intends to publish racial and ethinc statistics in the *HUD Statistical Yearbook.*[66]

C. ANALYSIS OF RACIAL AND ETHNIC DATA

Federal Agencies could take specific steps to insure that racial and ethnic data are used to measure distribution of program benefits. They could establish an agencywide mechanism for data analysis. For example, as in HEW, data could be submitted to the Offices for Planning and Evaluation, which could take responsibility for reviewing and interpreting the material.[67]

Agencies could direct program managers to conduct their own analyses. Program managers could be held responsible for such facts as the extent to which program benefits and information about program benefits are provided to minorities, and the quality of the benefits received by minority groups. For example, the Veterans Administration could compel its Compensation, Pension, and Education Service to determine the number and percentage of potential minority beneficiaries receiving Federal educational assistance. In general, Federal Agencies have not placed such responsibilities on program staff. Federal Agencies could also instruct program managers to conduct specific analyses, but again they have not done this. For example, HEW has not directed its Social and Rehabilitation Service to compare estimates of minority children in families with no means of support with estimates of minority children receiving benefits from the Aid to Families with Dependent Children Program. The Department of Labor has not required the Manpower Administration to use racial and ethnic unemployment rates[68] as a basis for evaluating the success of referrals by State employment services.

Finally, in order to insure the use of racial and ethnic data collected, Federal Agencies could provide technical assistance to program directors. This, however, is done infrequently. Even where assistance is offered, as at the Department of Agriculture,[69] some program managers have been slow to welcome suggestions, and have sometimes not even used the data collected. In the Agencies studied, where there has been analysis of racial and ethnic data to determine the distribution of program benefits to minorities, the analysis has often been conducted at the direction of a few farsighted program managers rather than as an intrinsic part of an agencywide study.

Some of the possible analyses of racial and ethnic data collected to enforce civil rights requirements are discussed in this section:[70]

1. PROGRAM PARTICIPATION

It is an important responsibility of program managers to determine the extent to which eligible beneficiaries of each of several racial or ethnic groups are participating in their programs. To do this, it is necessary to compare statistics on the racial and ethnic origin or persons eligible[71] to participate in a particular program with similar statistics of those persons *actually participating* in that program.

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[65] See Department of Agriculture, *Participation in USDA Programs by Ethnic Groups,* July 1971. This report presents racial and ethnic statistics on participation in select programs.

[66] Interview with Laurence D. Pearl, Acting Director of Equal Opportunity in Mortgage Credit-Federal Housing, and staff, Department of Housing and Urban Development, Sept. 16, 1971.

[67] In the case of HEW, however, the Office for Planning and Evaluation has not had sufficient resources even to examine the quality of the data submitted, so that evaluation of program performance has so far been out of the question.

[68] Unemployment rates are now calculated for blacks and whites but not for Spanish surnamed, American Indian or Asian American groups. A resolution in the House of Representatives introduced by Congressman Edward R. Roybal provides for the collection and compilation of data to enable the monthly publication by the Bureau of Labor Statistics (DOL) of the nationwide unemployment rate among Spanish speaking Americans. (H.J. Res. 970, 92d Cong. 1st Sess., Nov. 16, 1971.)

[69] At USDA, the departmental civil rights office offers program managers assistance in both the collection and analysis of racial and ethnic data.

[70] These analyses are not necessarily each applicable to all programs. They may be used alone or in combination. Program managers should be urged to select those analyses most appropriate for the types of programs they administer. Agency officials should provide guidance to insure that answers are sought to all pertinent question concerning distribution of assistance.

[71] Eligibility is defined here by meeting criteria (such as income, education, and military status) for program participation. For the purposes of this report, a person eligible to participate in a program is one who meets these criteria, irrespective of application for or receipt of certification of eligibility. To restrict data on eligible beneficiaries to those who had actually been certified by program staff as eligible for participation would defeat the purposes suggested here. For example, not all persons who meet criteria of eligibility may be aware of the program's evidence. Nevertheless, they should be included in any analysis of the extent to which

The need for this type of analysis was expounded in a study conducted by a group of Federal officials in the spring of 1971. The study noted the general absence of data on eligible beneficiaries and the resulting difficulty in determining whether or not all persons eligible for program participation were in fact being reached by that program.[72]

Comparisons between program participants and persons eligible to participate in Federal programs have been made by several Federal Agencies. The Veterans Administration, in a review of Project Outreach, attempted to determine the rates of participation in training by persons separated from the Armed Forces between July 1968 and December 1967.[73] In the six Agencies studied, however, it was found that data on the population of eligible beneficiaries were rarely collected and that program officials only infrequently made use of other sources to determine the racial and ethnic composition of eligible beneficiaries.[74] In some cases, even when data on eligible beneficiaries were available and comparisons between participants and eligible beneficiaries were made, the criteria for judging adequacy of minority program participation were vague and undefined and the quality of the eligibility data used was poor.

In some instances, although a comparison between actual beneficiaries and eligible beneficiaries was intended, instructions for judging the results have been insufficient. The Farmers Home Administration, for example, made a rough comparison between its loan program participants and persons eligible for participation as measured by county population. Instructions for evaluating the results stated that:

> It is logical to expect that minority groups should have at least some representation on a committee when they comprise 20 percent or more of the . . . farm population. It is also logical that representation should increase when the 50 percent mark is reached.[75]

While this memorandum is commendable for directing attention to county minority population in measuring minority representation on county committees, the instructions for assessing comparison between population and participation lack sufficient precision to determine imbalance. Without more definite guidelines than "at least some" minority representation and "increase", in many instances underrepresentation would go undetected.[76] Similarly, Extension Service representatives here stated that, in evaluating minority participation, they would be on the alert to identify "heavily black areas" with no black par-

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program benefits are reaching the persons for whom they are intended. (It should be noted, however, that data on persons certified as eligible for program participation can also be used to study the extent to which there may be inequities in the process of certification of eligibility.) The population of eligible beneficiaries includes both those who are served by a particular program and those who are not.

[72] Report of the Interagency Racial Data Committee (formerly the Sub-Committee on Racial Data Collection) to the Interagency Committee on Uniform Civil Rights Policies and Practices, *The Racial Data Policies and Capabilities of the Federal Government*, Apr. 7, 1971.

This report found that most Federal programs do not collect or use racial and ethnic data on program beneficiaries. It concluded that the principal reasons for the grams and do not have data on the amount or quality of assistance distributed to minority or majority group beneficiaries. It concluded that the principal reasons for the absence of such information were the lack of Agency policies requiring these data and the lack of established procedures for implementing such a system.

The Uniform Practices Committee was convened by the Office of Economic Opportunity in November 1970 to identify some of the problems associated with the Government's equal opportunity responsibilities and to recommend improvements. The Racial Data Committee, of which Morton H. Sklar and Margaret A. Cotter, Attorneys, Title VI Section, Department of Justice, were Co-Chairmen, was formed to study the means by which program managers could become more responsive to minority needs.

[73] Veterans Administration, *Two Years of Outreach, 1968-1970, A Report from the Administrator of Veterans Affairs*. Project Outreach is a program to inform Vietnam Veterans of the rights and benefits available to them. The study drew few conclusions concerning participation in VA programs by race or ethnic origin. Statistics were separately enumerated for two groups: "Negro" and "non-Negro". This distinction, however, was not made for all veterans, but only for enlisted reservists, which eliminated many possibilities for comparison. Although the study found that only 18.3 percent of black enlisted reservists entered training as compared with 23.9 percent of non-black enlisted reservists, no explanation of these findings was provided in the report.

[74] The Interagency Racial Data Committee findings were similar with regard to the Agencies it studied. See Report of the Interagency Racial Data Committee, *supra* note 72.

[75] Memorandum from the Assistant Administrator, Farmers Home Administration, Department of Agriculture, "Appointment of Minority County Committeemen", to State Directors, Sept. 11, 1969.

[76] While these instructions clearly are too vague, it is beyond the scope of this report to formulate guidelines for measuring the adequacy of minority participation. To date, the Commission is unaware that any Agency has developed comprehensive guidelines for measuring minority participation.

ticipation. No explicit standards were set, however, for judging the adequacy of minority participation in terms of eligibility.[77]

An analysis of program participation can have grossly misleading results when the characteristics of the eligible population have not been carefully determined. The Federally Insured Student Loan Program (HEW) which guarantees loans made by financial institutions to students who need assistance for higher education has compared the race and ethnic origin of program participants with that of the general college population.[78] This analysis showed a favorable rate of minority participation in comparison with minority participation in higher education. If the comparison had been made between program participants and high school students interested in attending college who also required financial education assistance, the results would probably have been less flattering.

Another misleading comparison is found in statistics publicized by the Veterans Administration. In the sale of VA acquired housing,[79] both the "offers made" and the "offers received" showed about 40 percent minority participation.[80] As the Veterans Administration has pointed out, this rate compares favorably with the minority composition of the Nation's population.[81] After in-house investigation, however, the VA became aware that by equating the total U.S. population with population eligible to make offers on VA acquired housing, its original comparison neglected the fact that these properties were primarily located in cities.[82] Statistics on the racial and ethnic composition of those cities or of the neighborhoods in which the property was located had not been utilized.[83] Further, the original analysis did not take into account the race or ethnic origin of the former occupants or owners.[84] Consideration of such data in evaluating the extent to which minorities were purchasing VA acquired housing might have made the 40 percent rate look substantially less favorable.

It should be emphasized that an analysis of program participation comparing statistics on eligibility and participation covers the entire delivery process. If such an analysis demonstrated that minorities were not adequately participating in a particular Federal program, it would be necessary to determine whether or not minorities were applying for program benefits and, if so, if they were subsequently being eliminated in the application or distribution process.

2. RECEIPT OF APPLICATIONS

It is important to appraise the extent to which minority group persons apply, in person or in writing, for Federal program benefits. This can be done by comparing the race or ethnic origin of program applicants with that of persons eligible for participation. This is useful in determining whether or not information about program benefits is reaching all intended beneficiaries. It is also important in calculating if any racial or ethnic groups encounter barriers in making assistance applications. Although information about program benefits may be published frequently, it may not be circulated in minority newspapers, on minority radio or television stations, or in other media most certain to reach that audience.[85]

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[77] Interview with Edwin Kirby, Administrator, and staff, Extension Service, Department of Agriculture, Aug. 12, 1971.

[78] Interview with Jerald Donaway, Chief, Federally Insured Loan Section, Insured Loans Branch, Division of Student Financial Aid, HEW, Jan. 22, 1971. This comparison may be deceptive because it includes only those persons who are currently enrolled in higher education and thus may be assumed to have found some way to finance their education. Consequently, it does not take into account large numbers of high school students who never attend college because of lack of financial support, college students who have been unable to complete their studies because of inability to finance their education, and persons whose financial situation was such that even with a student loan, higher education was not possible. This analysis also erroneously includes in the target population for assistance those persons attending a college, university, or other educational institutions but who did not need or were not financially eligible for student loans.

[79] The Veterans Administration acquires 1,200 to 1,300 properties a month from foreclosures on VA mortgages. The properties are then sold on the open market.

[80] Blacks, Spanish surnamed persons, Asian Americans, and others were counted as minorities. Interview with Aaron Englisher, Staff Assistant, Equal Opportunity in Veterans Guaranteed Housing, Department of Veterans Benefits, Veterans Administration, Aug. 4, 1971.

[81] According to 1970 census figures, minority groups, including Spanish surnamed persons, comprised slightly less than 20 percent of the population.

[82] Interview with Aaron Englisher, Staff Assistant, Equal Opportunity in Veterans Guaranteed Housing, Veterans Administration, Aug. 4, 1971.

[83] *Id.*

[84] *Id.* This more valid comparison was never actually made.

[85] Cf. W. B. Breed, "The Negro and Fatalistic Suicide", *Pacific Sociology Review*, Vol. 13, at 156-162 (1970). This report cites several cases of suicides by blacks over problems which could easily have been solved with access to community resources. The Health Services and Mental Health Administration (HSMHA) commented that there is some

If program offices are not accessible to minority neighborhods, or if bilingual staff members are not available, the application process may present insurmountable difficulty for some racial and ethnic groups.

A comparison of potential beneficiaries with applicants is particularly appropriate when applications are made in writing since applicant records can be amended to include racial and ethnic identification. However, the use of this means of analysis was not reported in the six Agencies studied. In general, the data necessary for such an analysis are not currently available; most Agencies have not retained data on unsuccessful applicants,[86] and do not have adequate statistics on persons eligible to participate in Federal programs.

3. ACCEPTANCE OF APPLICATION

Where Federal assistance is obtained by application, it is important to determine whether or not applications are accepted on a nondiscriminatory basis. At the point of application, it is possible that overt or covert discrimination occurs. Thus, it is of the first importance to compare the racial and ethnic origin of persons applying to Federal programs and that of those accepted. Some program managers believe that such a comparison is unnecessary because they say they have sufficient familiarity with program operations to feel assured that intentional elimination of applicants for racial ro ethnic reasons does not occur.[87] It should be noted, therefore, that this analysis should be used to insure also against systemic or institutional discrimination. To illustrate, it is possible that, at the point of application, requirements are made, whether essential or not, which effectively reduce or eliminate minority acceptance. For example, shorter life expectancy for particular racial or ethnic groups might result in decreased minority participation in programs for senior citizens, such as those sponsored by HEW, HUD, and the VA, in those cases in which the eligibility requirement is to be age 65 or some other definite age.[88]

Many programs should be able to acquire without difficulty the data needed for a comparison of the race and ethnic origin of applicants and program participants. This comparison requires only information which can be routinely collected by any program using application forms.[89]. It does not require, for example, the more difficult task of obtaining data on eligible beneficiaries.

Among the few programs conducting any analysis of racial and ethnic data, the use of this comparison occurred with some frequency. In its sale of acquired property, the Veterans Administration has

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question of whether community resources were unused because of limited information or because discriminatory practices were "anticipated". *HSMHA Health Report*, Vol. 87 at 5, January 1972. The Massachusetts State Advisory Committee to the U.S. Commission on Civil Rights recently found that in the Boston-Springfield, Massachusetts area: "No . . . brochure explaining the rights and limitations of welfare recipients in Spanish has been offered. . . ." which resulted in delays in the processing of applications from the Spanish speaking community. *Issues of Concern to Puerto Ricans in Boston and Springfield* Report of the Massachusetts State Advisory Committee to the United States Commission on Civil Rights, at 54, February 1972.

[86] See Section II, B 2, for a further discussion of the availability of applicant data.

[87] Interview with J. T. Taaffe, Director, and staff, Compensation, Pension, and Education Service, Veterans Administration, Aug. 13, 1971. Guidelines, practices, and policies may themselves be discriminatory; discrimination is not only intentional and does not occur only at points in the delivery process which involve personal decisions.

[88] The average life expectancy at birth is 71.3 years for whites. (Although Spanish surnamed persons are included in these calculations, there is reason to believe that life expectancy is lower for this group, even through reliable data do not exist.) See Arthur E. Raya, Special Assistant for Health Needs of Spanish Surnamed Americans, Office of the Secretary, Health, Education, and Welfare, "Imaginative Approaches to Health Problems in the Southwest States," presented at the XXIX meeting of the United States-Mexico Border Public Health Association. March 29, 1971. The average life expectancy is 64.6 for all others.

Death rates for nonwhites are higher than for whites at all ages until age 75. U.S. Department of Health, Education, and Welfare, *Vital Statistics of the United States*, Vol. II, Mortality, (Tables 1-3 and 5-2) 1968. The National Center for Health Statistics at HEW does not maintain separate figures for any other racial or ethnic groups. Proportionately, twice as many whites as blacks reach age 75. Because of this, Inabel B. Lindsay, D.S.W., Dean Emeritus, Howard University, recommended to the Senate Special Committee on Aging amendments to the Social Security Act which would extend benefits to blacks at an earlier age so that they would receive full benefits from their past contributions to Social Security.*The Multiple Hazards of Age and Race: The Situationof Aged Blacks in the United States*, a preliminary survey for the Special Committee on Aging, United States Senate, at 35, September 1971. Shorter life expectancy is a problem not only for blacks, but for other minority groups as well. For example, it should be noted that the average life expectancy of American Indians is 62.0. Department of Health, Education, and Welfare, *Indian Health Highlights* at 15, 1964.

[89] This comparison requires the use of data on all applicants, both successful and unsuccessful.

compared the race and ethnic origin of total offers with that of accepted offers.[90] The Agricultural Stabilization and Conservation Service (USDA) has compared the race and ethnic origin of those individuals requesting cost sharing with that of owners or operators approved for cost sharing.[91]

4. QUANTITY OR QUALITY OF SERVICE OR BENEFIT

Not only is it important to determine the number and percent of minorities served, *but it is also important* to determine the extent to which those minorities received an equitable share of program goods or services. This analysis requires that one or more aspects of the goods or services delivered, such as the amount of benefit, the size of loans, the rate of interest the number and length of counseling sessions, the frequency of training, or the location and value of housing, be quantified and compared for each racial and ethnic group.

Data on the amount of benefits distributed are often collected in the routine course of program operations, especially in financial assistance programs in which the benefits are easily quantifiable.[92] If data are maintained by race and ethnic origin, this is sufficient for a comparative analysis of program benefits.

In interpreting the results of this type of analysis, two questions must be asked. First, have the distribution of benefits been equitable according to the established guidelines and commensurate with beneficiary eligibility requirements? For example, receipt of disability Social Security benefits is dependent both on the existence of a disability which prevents gainful employment and on past earnings. Similarly, receipt of unemployment compensation is dependent upon both inability to obtain employment and on past earnings. In these cases, it is important to measure the extent to which benefits received by each racial and ethnic group are commensurate with the extent of disability or unemployment and past earnings.

Second, are the guidelines themselves equitable and do they result in the equitable distribution of *benefits to minorities?* Continuing the above example, the benefit paid to each group by the disability Social Security and Unemployment Compensation programs must be compared not only with the extent to which each group met certain criteria for eligibility, but also with each group's extent of need.

The Social Security Administration tabulates the amount of Social Security benefit by race in the course of program administration. Staff members note certain disparities in the amount of benefits paid by race, but point out that the average earnings paid into the Social Security Administration vary by race.[93]

In general, additional data may be required to interpret the results of such comparisons. For example, the Department of Health, Education, and Welfare has attempted to measure, by program, the total number of dollars of Federal assistance it provides to each of five racial and ethnic groups.[94] HEW programs are not required to calculate the average size of benefit received by any given minority beneficiary, nor do they calculate the average or total need for particular benefits of any given minority group. In the absence of this additional information, the data produced have very little meaning.[95]

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[90] Englisher interview, *supra* note 82.

[91] Department of Agriculture, *Participation in USDA Programs by Ethnic Groups*, July 1971. The Agricultural Stabilization and Conservation Service administers programs of price support and production adjustment designed to bring production in line with demand. Cost sharing assistance is supplied to land owners and farm operators for the establishment of approved conservation practices. Similarly, the Small Business Administration compares applications with acceptances in its loan programs.

[92] Records of the amount of benefits issued are generally maintained by programs of direct financial assistance at the Veterans Administration, the Social Security Administration, and loan programs at HUD, USDA, VA, and HEW. The Manpower Administration keeps extensive records on its benefits such as job referrals and participation in training programs. Managers of many other programs, however, such as those administered by the Office of Education (HEW) or the child nutrition programs at Food and Nutrition Service (USDA), in which assistance to beneficiaries is not primarily financial, are vague about the amount of benefits furnished to particular beneficiaries.

[93] Interview with Tom Staples, Special Assistant, Office of the Assistant Commissioner, and Robert N. Heller, Special Assistant for Liaison with Users of Social Security Data, Social Security Administration, Department of Health, Education, and Welfare, Aug. 25, 1971.

[94] Department of Health, Education, and Welfare, Office of the Assistant Secretary for Planning and Evaluation, *Long Range Program Planning System*, Program Planning Structure (Blue Book), at 101-109, 135-136, 145-146, 1971.

[95] It should also be noted that often, in order to interpret the results of this type of analysis, the comparison must be supplemented with data on the needs of particular minority groups, data which do not tend to be collected in the course of program operations but which may be compiled by Federal general purpose data collection Agencies or in the course of Federal and private research. Although this report focuses primarily on racial and ethnic data collection in programs of Federal assistance, it was noted that in general purpose data collection, (e.g., vital health and unemployment statistics), the categories used are generally no more

5. DIFFERING NEEDS OF PARTICULAR MINORITY GROUPS

The need for Federal services and benefits varies among racial and ethnic groups. The requirements of each group need to be assessed and measured. Striking examples of differing requisites occur in the areas of health, education, and social services. As noted earlier, certain diseases, such as sickle cell anemia, Tay-Sachs disease, Thalassemia, and trachoma[96] are more prevalent in some groups than in others. In education, foreign speaking groups have specific need for bilingual education, and racial and ethnic groups have stressed the importance of instruction relating to their own heritage.[97] In social services, minority groups have also noted the importance of having available service workers who are familiar with their culture and problems. Persons who do not speak English have emphasized the need for personnel who can speak their language. They have also pointed out the significance of information given on program benefits in their own language.[98]

No program officials interviewed reported the systematic measurement of specific minority needs for the services provided. To the extent that such information is unavailable to program managers, and to the extent that this has not been taken into account in program planning, the resulting program delivery systems may, in fact, be discriminatory.

6. PROGRAM RESULTS

Program managers must evaluate program results not only for total beneficiaries but with regard to each specific minority group participating. In this type of analysis, it would be necessary to qualify such program results as the number of trainees who obtain jobs in their fields, the extent of unemployment and job instability among the graduates of a program, the number of youngsters who are brought up to grade level in reading, or a decrease in incidence of disease. The program results are then compared for each racial and ethnic group. The results may be examined alone, as in impact studies, or in conjunction with the particular techniques used to meet program objectives (strategy evaluations).[99]

While disproportionate results among racial and ethnic groups would not necessarily be indicative of discriminatory practices in program administration, the results of such evaluations are obviously important in planning future programs. It should also be noted that this analysis, like that of comparing benefits received, may also be dependent upon differing needs of minority groups. Interpretation may also require base line data on the variables to be affected, such as reading level, job skills, or health, prior to the start of the program.

Despite the importance of including the variables of race and ethnic origin in program impact studies, the use of this analysis was not reported by any program officials interviewed.

7. INTEGRATION OF SERVICES

In this analysis, the racial and ethnic composition of participants in a given facility or activity is compared with that of participants of other nearby and related facilities or activities. A comparison might be made of pupils in a particular Head Start project with pupils in all Head Start projects in a county, or with pupils in one other nearby Head Start project. This analysis would be appropriate for use in comparing assignment to classrooms or schools, for membership in 4-H Clubs,[100] and for college acceptance or dormitory assignments.[101]

An example of an analysis of this type is the

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extensive than for whites, blacks, and others. That these types of data are important in analyses of distribution of program benefits for minorities underscores the need for the collection of general purpose statistics for all major racial and ethnic groups. See, for example, Raya paper, *supra* note 88.

[96] Interview with Bernard Kaufman, Director of Reports and Statistics, and J. Herbert Smith, M.D., Deputy for Professional Services, Department of Medicine and Surgery, Veterans Administration, Aug. 4, 1971.

[97] It is noted that bilingual and bicultural education can be important for all racial and ethnic groups, nonminority as well as minority. See the U.S. Commission on Civil Rights, *The Excluded Student, Educational Practices Affecting Mexican Americans in the Southwest.* Mexican American Education Study, Report III, May 1972.

[98] Linguistic differences, while characteristic of many Asian Americans, American Indians, and persons of Spanish speaking background, are not characteristic of all members of those groups. In an analysis of the interaction between success of program objectives and language spoken it might be preferable to use an actual measure of language spoken and not racial or ethnic identification.

[99] See Section I, B.2,6 for further discussion of the role of impact studies and strategy evaluation and program evaluation.

[100] The Extension Service (USDA) makes available funds for the salaries of county agents who provide guidance to local 4-H Clubs. 4-H Clubs are organizations for youth which offer an opportunity to participate in projects leading to personal growth and increase of knowledge, science, and technology.

[101] Analysis by Federal assistance programs would be limited to data concerning recipients of such assistance.

periodic survey information collected by the Department of Health, Education, and Welfare on elementary and secondary school enrollment. HEW collects data on enrollment in particular schools and compares them with school district enrollment. More recently, HEW has also compared the racial and ethnic composition of neighboring school districts.

There are many possible indices of integration to quantify comparisons between the racial and ethnic composition of particular schools within a given school district, and the racial and ethnic composition of the entire district.[102] Similar indices have been developed by private groups to determine the extent of segregation in housing.[103] Undoubtedly these could be applied to many other areas of Federal assistance. These indices can be used to provide comparative information, such as on the desegregation in each of several school districts. An analysis can also be conducted to show the extent to which each school within a given district contributes to the overall district index of desegregation.

In using this type of analysis a standard could be developed for the acceptable degree of difference in the racial and ethnic composition of the activities or facilities being compared.[104] Each unit could also be evaluated in terms of the extent of integration found within it as compared with that found in similar units.[105] This is advantageous because it can be conducted with participation data alone and does not require other supporting statistics, such as applicant data, eligibility data, or data on the needs of particular minority groups.[106]

8. TIME COMPARISON

This analysis compares the current status of minority participation with that of some earlier date. In general, this analysis must be combined with some other analysis such as the extent to which eligible beneficiaries are participating in program benefits. A comparison of the racial and ethnic origin of program participants with the racial and ethnic origin of participants at some earlier time is appropriate to measure achievement against certain goals or the maintenance of particular standards, or to measure service to minority beneficiaries in cases in which there is obvious room for improvement in increasing participation by minority groups.

Such an analysis might be used by the Rural Electrification Administration (USDA) which reported that in 1970 there were only seven blacks[107] serving on the boards of directors of cooperatives served by the Rural Electrification Administration (REA), although more than 1,000 cooperatives are served by REA. At some future time a comparison of the results of a concentrated effort in increasing the number of minority board members with the 1970 participation figures might be the basis for an important analysis. As minority participation begins to approach an acceptable level, more sophisticated analyses of racial and ethnic data would undoubtedly be necessary in order to insure equitable participation throughout the country.

It should be noted, too, that the mere citation of comparability figures can be particularly misleading in that a significant improvement over a period of time may obscure the remaining inequities in program participation. The USDA publication on minority participation compared the number and percent of loans made to blacks by the Farmers Home Administration in 1969 with that in 1970.[108] No other data were presented to demonstrate the extent to which the rate of loans to blacks was commensurate with the rate of application for loans by blacks; no data were given on the percent of population eligible for loans who were black. Thus, the data presented were insufficient to determine the adequacy of the program with regard to black beneficiaries. The most appropriate and informative use of time comparisons is to combine them with any of the other analyses described here.[109]

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[102] See Ira H. Cisin, Director, Social Research Group, George Washington University, "Statistical Indices of School Integration", Unpublished paper, 1970. The research in this paper was supported in part through a contract with the Office of Civil Rights, Department of Health, Education, and Welfare. See also California State Department of Education, Office of Compensatory Education, "Measuring the Racial or Ethnic Imbalance of Schools", (1968); H.R. 13079, 89th Cong., 2d Sess., introduced Feb. 24, 1966; Warshauer and Dentler, "A New Definition of School Segregation" in *The Urban R's*, at 6-23, 1967; and Bolner, "Defining Racial Imbalance in Public Educational Institutions", Journal of Negro Education, Vol. XXXVII, No. 2, at 114-126, 1968.

[103] K. E. Taeuber and A. F. Taeuber, *Negroes in Cities: Residential Segregation and Neighborhood Change*, at 195-245 (1965); see also O. D. Duncan and B. Duncan, "A Methodological Analysis of Segregation Indexes", *American Sociological Review*, *XX*, 210-217, 1955.

[104] These methods of measuring segregation generally are based on the theoretical assumption that if there were no segregation, all schools within a school district would have the same racial and ethnic balance. A given amount of deviation from this standard is defined as acceptable. The difference between the racial and ethnic composition of the school and that of the school district is then measured and assessed.

[105] This analysis does require that data on total participation in each particular facility be available. Data aggregated solely at the State level could never be used to perform such an analysis.

[106] Each school district is rated according to its schools' racial and ethnic balance found within its schools. School districts are then compared with each other.

[107] Interview with David Hamil, Administrator, and staff, Rural Electrification Administration, Department of Agriculture, Aug. 13, 1971.

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[108] *Participation in USDA Programs by Ethnic Groups, supra* note 91.

[109] See Michael J. Flax, Blacks and Whites, *An Experiment in Racial Indicators*, 1971, for analyses which utilize comparisons of data over time. Time comparisons can also be used for forecasts. See Harvey A. Garn, *Nonwhite Gains—Present Policy Trends*, Urban Institute paper, 1969.

II. Racial and Ethnic Data Collection

A. SELECTION OF PROGRAMS AND PROGRAM ACTIVITIES

While some Agencies have taken steps to insure nondiscrimination by issuing agencywide policies requiring the collection of racial and ethnic data,[1] they have been guilty of serious omissions in identifying activities for which these data should be collected. Although nondiscrimination is required in all Federal programs, racial and ethnic data collection has not been so universal a requisite. In general, racial and ethnic data collection has been focused on those Federal programs of assistance with obvious or direct significance for minority and disadvantaged beneficiaries.

The Department of Agriculture Civil Rights Evaluation staff, responsible for administering the Secretary's directive concerning the collection of racial and ethnic data,[2] has interpreted that directive as applying only to those USDA constitutent Agencies which have a special responsibility for serving minority beneficiaries.[3] Only nine Agencies, fewer than half of all USDA Agencies have thus been identified.[4] The remaining Agencies generally provide assistance in areas in which minorities have traditionally not participated or from which they have been excluded.[5] For example, some provide assistance for agricultural research, where educational requirements serve to limit the number of minority participants. The Department of Agriculture, thus, does not know to what extent minority persons serve as principal investigators or as staff members on research projects it funds.[6]

Within Federal programs identified for racial and ethnic data collection, similar omissions have been made in selecting particular activities for data collection. In many Federal programs there are several aspects of Federal assistance. The program mandate may cover not only the distribution of goods or services, but also research, technical assistance, or training.[7] Although minority participation should be ascertained in all areas of the program aspects with significant value or cost to individuals, measurements have often been restricted to the principal assistance provided. Separate distinctions among program activities are required by the Department of Health, Education, and Welfare in the data submitted to the Office of the Assistant Secretary for Planning and Evaluation,[8] but this is an exception. Department of

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[1] Federal Agency policies regarding the collection of racial and ethnic data are discussed in Section I, A.

[2] Clifford M. Hardin, then Secretary of Agriculture, issued a requirement that racial and ethnic data be collected in all Department of Agriculture programs. Department of Agriculture, Supplement No. 1 to the Secretary's Memorandum 1662, July 27, 1970.

[3] Interview with Percy R. Luney, Chief, Evaluation Unit, Office of Equal Opportunity, Department of Agriculture, July 27, 1971.

[4] Those Agencies are the Agricultural Stabilization and Conservation Service, the Extension Service, the Farmer Cooperative Service, the Farmers Home Administration, the Federal Crop Insurance Corporation, the Food and Nutrition Service, the Forest Service, the Rural Electrification Administration, and the Soil Conservation Service.

[5] Agencies with no data collection requirement include the Agricultural Research Service, the Commodity Exchange Authority, the Consumer and Marketing Service, the Cooperative State Research Service, the Economic Research Service, the Export Marketing Service, the Foreign Agricultural Service, the National Agricultural Library, the Office of Information, the Packers and Stockyards Administration, and the Statistical Reporting Service.

[6] Further, it should be noted that financial assistance for research has been an important means by which colleges and universities have built up resources and equipment. In Fiscal Year 1968, the Department of Agriculture gave less than $400,000 to black land-grant colleges and nearly $60 million dollars to white land-grant colleges in the same States.

[7] For example, Follow Through at the Office of Education (HEW) not only provides assistance for special programs of instruction in elementary schools for continuation of and supplementation to gains from participation in Head Start programs, but it also provides funds for research in early primary education. The Food and Nutrition Service (USDA) sponsors research as well as providing assistance for food stamp and school nutrition programs.

[8] While HEW does not require the actual collection of racial and ethnic data on program participants, it does require the submission of data on the dollar value of program outlays by the race and ethnic origin of program

Agriculture policy requires that racial and ethnic data be collected on "all significant aspects of program participation including participation in local committees by the persons intended ultimately to benefit." [9] In practice, however, the Department of Agriculture has often required data on only one aspect of assistance within each program, with the result that the data collection does not reflect all types of assistance provided by a given program. To illustrate, the Food and Nutrition Service collects no racial and ethnic data with regard to assistance provided for research.[10] In addition to the primary benefits of a program, significant secondary effects, either positive or negative, often exist.[11] The opportunity to operate a concession at an airport, for example, arises as a secondary result of a transportation program, can provide economic benefit to the concessionnaire, and should be extended to minorities. Similarly, real estate brokerages, banks, and lending institutions which have traditionally perpetuated discrimination,[12] reap the benefits of expanded business opportunities as a result of housing and mortgage programs administered by the Department of Housing and Urban Development.

The responsibility of program managers to insure nondiscrimination in program operations extends to these secondary benefits. Especially when the secondary benefits are of considerable value, racial and ethnic data should be collected to determine equitable benefit distribution. It is a weakness that staff members charged with implementing Agency racial and ethnic data collection policies have not generally taken the initiative to extend these policies to secondary beneficiaries.[13]

Secondary effects may also be negative. Federally assisted construction, for example, may require relocation of individuals, disrupt community patterns, or impede business. In some cases, those negatively affected may receive a measure of compensation.[14] In other cases, there may be no regular provision to compensate individuals affected by air pollution from Federal power plants or highways.

Accusations that negative effects of Federal programs have been disproportionately borne by minority group individuals have been frequent.[15] Program managers have an obligation to insure both that unavoidable negative effects of Federal activity are

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participants. (Blue Book), *Long Range Planning System; Program Planning Structure.* Department of Health, Education, and Welfare 1971.

[9] Supplement No. 1 to the Secretary's Memorandum 1662, *supra* note 2.

[10] Interview with Albert McDowell, Civil Rights Coordinator, Forest Service, and Forest Service staff, Department of Agriculture, Aug. 3, 1971.

[11] In some cases the distinction between primary and secondary beneficiaries of a Federal program is vague. In this report those receiving benefits which are not tantamount to primary benefits intended by law are considered as secondary beneficiaries. Thus, pupils in a class taught by a teacher trainee might be secondary beneficiaries of a Federal teacher training program.

[12] See, for example, Davis McEntire, *Residence and Race*, Final Report to the Commission on Race and Housing, 1960, Chs. XII, and XIV; Rose Helper, *Racial Policies and Practices of Real Estate Brokers*, 1969; National Urban League, *Building for Equal Opportunity, Report for 1956-1957*, 1958, Donald S. Frey, Freedom of Residence in Illinos, *Chicago Bar Record*, XLI, Oct. 1959, at 9-21; American Jewish Congress, Commission on Community Interrelations, *Northtown Survey on Human Relations*, 1947; Paul F. Wendt and Daniel B. Rathbun, the *San Francisco Bay Area Residential Mortgage Market*, 1952.

[13] One exception is the Veterans Housing Guaranteed and Insured Loan program at the Veterans Administration where racial and ethnic data on secondary beneficiaries have been collected on real estate brokers and the degree to which broker-client relationships extend across racial lines. Racial and ethnic data have also been collected to survey the race and ethnic origin of property management brokers (contracted by the VA to arrange for repair and upkeep of housing sold by the VA) and fee appraisers of VA approved housing. Interview with Aaron Englisher, Staff Assistant, Equal Opportunity in VA-Guaranteed Housing, Veterans Administration, Aug. 4, 1971.

[14] Compensation for relocation includes such things as reimbursement for moving expenses, additive payments for replacement housing, and incidental fees. It does not include compensation for loss of neighborhood, loss of income from business, or inconveniences and other intangible effects.

[15] E.g., In Detroit, HUD funded urban renewal resulted in the removal of a large number of blacks from the city. *Garrett* v. *City of Hamtramck* (D.C. E.D. Mich., S. Div., 1971) No. 32004. In St. Louis, as of November 1969, approximately 76 percent of all families displaced were black. Almost half of all families relocated because of urban renewal activities were black as of June 1970. HUD statistical yearbook, 1970, at 73. Interview with Hazle I. Gibson, Director, Relocation Branch, HUD Region V., Ft. Worth, Tex., Nov. 12-13, 1969; cited hearing before the United States Commission on Civil Rights, St. Louis, Mo., 1970, Staff Report, Housing in St. Louis, at 561. In Nashville, Tenn., it has been alleged that highway construction resulted in the destruction of viable minority communities. *Nashville I-40 Steering Committee* v. *Buford Ellington, Gov.* 387 F. 2d 179 (1967). In Alameda County, Cal., highway construction has been discontinued because of displacement of large numbers of Mexican Americans without adequate replacement housing. *La Raza Unida, et. al.,* v. *Volpe, et al.* No. C-71-1166 RFP (U.S. D.C. N.D., Calif. Nov. 8, 1971).

not placed more heavily upon particular groups and that compensation for negative program effects is provided equitably. To carry out this responsibility the collection of racial and ethnic data is necessary, but this has occurred only in connection with displacement because of Federal activity.

Such Agencies as the Department of Transportation, principally its Federal Highway Administration,[16] and the Department of Housing and Urban Development have collected limited racial and ethnic data on highway and urban renewal displacement.[17] Collection of racial and ethnic relocation data has not been mandatory in all Agencies,[18] although this situation may be improved to some extent by Office of Management and Budget (OMB) action. OMB has proposed governmentwide guidelines for implementation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970[19] which would make such data collection mandatory.

The proposed guidelines, however, are incomplete in that they do not provide for tabulating the amount of compensation received by race nor for determining in advance of project approval the effect of the proposed project on the minority groups involved.

Such guidelines, too, would present only a partial solution to the need for racial and ethnic data on negative effects of Federal programs which extend far beyond relocation because of federally assisted construction. Construction may impede access to a neighborhood or business. It may create barriers between minority and nonminority neighborhoods,[20] Federal assistance for power plants, sewage treatment facilities, airports, and highways may result in increased air, water, or noise pollution.[21] The effects of pollution are often greatest in urban areas, in which a high proportion of minorities are concentrated.

Once a project has been initiated, its negative effects may be borne disproportionally by minority communities, and it may be difficult, if not imposssible, to offer adequate compensation. For example, cash payments could not be sufficient recompense for the intangible losses suffered by the residents of a community which has been razed for urban renewal. Therefore, the race or ethnic origin of the affected persons should be calculated in advance of project approval. Nevertheless, only a limited amount of data has been collected which relates to the negative effects of proposed projects on minority groups involved. The Department of Housing and Urban Development[22] and the Urban Mass Transit Administration[23] (DOT) have required maps indicating concentrations of racial and ethnic minorities in the areas of proposed projects, enabling the evaluation of both negative and positive effects in terms of the race and ethnic origin of persons affected.

In addition, the Department of Transportation is considering the requirement that all applicants for DOT assistance for projects in metropolitan areas supply DOT with a specific analysis of the effect that the proposed project would have on existing patterns of racial concentration.[24] To be adequate, such a requirement would necessitate a racial and ethnic analysis of possible negative effects. No other Agency studied had such a requirement under consideration.[25]

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[16] These data, however, have been restricted to "white" and "nonwhite" categories which have limited use. Interview with Alexander Gaither, Director of Civil Rights, and staff, Federal Highway Administration, Department of Transportation, Sept. 9, 1971.

[17] Interview with Laurence D. Pearl, Acting Director of Equal Opportunity in Mortgage Credit-Federal Housing, and staff, Department of Housing and Urban Development, Sept. 16, 1971.

[18] See, for example, interview with Marvin Dunn, M.D., Chief, Health Professions Facilities Construction, Division of Education Research Facilities, National Institutes of Health, Department of Health, Education, and Welfare, Feb. 26, 1971.

[19] 42 U.S.C. Sec. 4601 (1970). This act provides for monetary and technical assistance to individuals and businesses displaced because of Federal activity.

[20] This has been an alleged result of highway construction in Tulsa, Okla.; Watts, Cal.; *Mapleridge* v. *Volpe*, C.A. 72-C-53 (U.S.D.C., N.D. Okla.) Feb. 18, 1972 and *Keith* v. *Volpe*, C.A. 72-355-HP (C.D. Calif.) 1971.

[21] Federal program managers should review the extent to which their programs bring negative consequences. Where these consequences have significant and unavoidable effects on individuals, the program managers should then determine if these effects place any undue burden upon particular racial or ethnic groups.

[22] Pearl interview, *supra* note 17.

[23] Interview with Harold Williams, Director, Office of Civil Rights, Urban Mass Transit Administration, Department of Tranportation, Sept. 13, 1971.

[24] Memorandum from John A. Volpe, Secretary of Transportation, to DOT Officials, June 28, 1971. DOT plans to issue a regulation to this effect, which is currently in draft form. Interview with Robert J. Coates, Program Manager, Office of Civil Rights, Department of Transportation, Feb. 11, 1972.

[25] The extent to which programs in the six Agencies studied have negative effects has not been reviewed here. DOT and HUD finance major construction programs, and the VA and

B. DATA REQUIRED [26]

1. BENEFICIARY DATA

Program beneficiaries are those individuals to whom assistance is ultimately provided.[27] They may be categorized either as participants or as users: [28]

Participants are beneficiaries who receive assistance through personal or written application [29] or through group membership, or through participation in a federally assisted activity.[30] This type of beneficiary status generally entails Federal or recipient recordkeeping which could be expanded to include the maintenance of racial and ethnic data.

Users of a federally funded facility or activity open to the general public are also beneficiaries of Federal programs.[31] The collection of racial and ethnic data on users generally requires the establishment of new records and the inauguration of special forms or survey techniques.[32]

Of the six Agencies studied, there are agencywide collections of beneficiary data only in the Department of Agriculture, the Manpower Administration (DOL) and the Department of Housing and Urban Development. USDA and the Manpower Administration have been explicit in their insistence that racial and ethnic data be collected on Federal program beneficiaries.[33] Although HUD policy does not explicitly require the collection of beneficiary data,[34] in general HUD now collects racial and ethnic data on all program beneficiaries, primarily purchasers and tenants.[35] In contrast, the Departments of Transportation, Health, Education, and Welfare, and the Veterans Administration have no policies requiring the collection of beneficiary data by race or ethnic origin and collect beneficiary data only on an *ad hoc* basis. Further, while any such data may be used for studies of beneficiary character-

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HEW finance hospital and facilities construction, all of which may provide negative effects. To implement a requirement that programs measure and correct any disproportionate burden of negative program effects on minority citizens, it would be necessary for Agencies first to require program managers to determine where negative effects exist within their programs.

[26] The extent to which beneficiary, eligibility, income, and benefit data are collected in the Departments of Agriculture; Commerce; Health, Education, and Welfare; Housing and Urban Development; Interior; and Labor are discussed in *The Racial Data Policies and Capabilities of the Federal Government*, a report of the Subcommittee on Racial Data Collection to the Interagency Committee on Uniform Civil Rights Policies and Practices, Apr. 7, 1971.

[27] Beneficiaries are distinguished from recipients of Federal programs, the intermediaries through whom Federal assistance passes. While the recipient is required to provide assurances of nondiscrimination, the beneficiary is protected by those assurances. Beneficiaries are themselves exempt from the requirements of Title VI of the Civil Rights Act of 1964. They receive, but do not distribute Federal assistance. (See Section I, Notes 1 and 34 for definitions of beneficiary and recipient.)

[28] While persons negatively affected by Federal programs are not specifically mentioned in this section, the needs for data regarding persons negatively affected by Federal activity are similar to the needs for beneficiary data. The techniques of data collection for persons negatively affected by Federal programs parallel those used for collecting beneficiary data, depending upon whether the negative effects are felt because of participation or use. The needs for supplementary data, such as data on personal characteristics and data on the size of the effect of Federal activity, are similar. But collection of data on persons negatively affected by Federal programs is not necessarily implied by an Agency requirement to collect beneficiary data and it is important that the collection of racial and ethnic data on persons negatively affected by Federal programs be specifically noted in Agency policy.

[29] Examples of beneficiaries receiving assistance as the result of applications made in person or in writing are Social Security (HEW) pensioners, families receiving Aid to Dependent Children (HEW), woodland owners receiving grants from the Forest Service (USDA) for forest improvements, and Federal Housing Administration (HUD) mortgagors.

[30] Examples of beneficiaries receiving assistance as the result of membership in a group or participation in an activity receiving Federal assistance' include children attending schools which participate in the Food and Nutrition Service (USDA) school breakfast program, and students living in a dormitory constructed with HUD funds.

[31] Examples are those who drive cars on highways, individuals using airports, and visitors to national or State parks.

[32] Because of the absence of forms completed by or for "users", data on their race and ethnic origin are efficiently collected by head counts, which will not link their race or ethnic origin with other identifying information. Thus, some of the issues regarding safeguards in racial and ethnic data collection do not apply to these data.

[33] Former Secretary of Agriculture, Clifford M. Hardin, directed each constituent agency within the USDA to "establish and maintain a system for collecting and reporting racial data on participation in USDA programs." Department of Agriculture, Supplement No. 1 to the Secretary's Memorandum 1662, July 27, 1970. The Department of Labor has directed that records of the race and national origin of enrollees and participants in all Manpower Administration programs be kept. Manpower Administration Order No. 18-71, July 20, 1971.

[34] The Department of Housing and Urban Development requires that all recipients of HUD assistance furnish whatever minority group identification is needed by the Secretary to carry out his civil rights responsibilities. 36 Fed. Reg. 10782 (June 3, 1971).

[35] Pearl interview, *supra* note 17.

istics, medical reference, or general information, they are not often used to measure distribution of program benefits to minorities.[36]

Existing beneficiary data are, in general, participant data. User data are only infrequently collected. Although, many DOT beneficiaries could be classified as users,[37] only its Urban Mass Transit Administration collects information on the racial and ethnic origin of users of federally funded transportation.[38] This information relates to proposed and not actual users: maps indicating all substantial concentrations of minorities in the area of proposed Capital Grant [39] projects must be submitted by potential recipients. The Department of Housing and Urban Development funds neighborhood facilities, such as parks, recreational centers, and civil centers,[40] and is requiring a one-time visual survey on the race and ethnic origin of the users of these facilities.[41] Sept. 16, 1971.

The Forest Service (USDA) provides assistance for recreational facilities [42] and racial and ethnic statistics on their use are sent to the Department of Agriculture by the forest rangers in charge of these sites.[43]

2. APPLICANT DATA

Racial and ethnic data are needed on all program applicants to ascertain the racial and ethnic origin of program applicants and to ascertain whether or not acceptance of applications is on a nondiscriminatory basis. However, often because of anticipated possibilities of misuse, many program managers have been reluctant to collect such data on applicants.[44]

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[36] Interview with John Hope II, Assistant Director for Planning, Office for Civil Rights, and HEW staff, Department of Health, Education, and Welfare, Aug. 12, 1971; interview with Robert Coats, Program Manager, Office of Civil Rights, Department of Transportation, Aug. 31, 1971; and interview with Dan R. Anders, Assistant Director for Construction and Title VI Compliance, Veterans Administration, Aug. 3, 1971. Within HEW racial and ethnic data are collected by the Office of Civil Rights with regard to hospitals and schools, but these data are not collected with regard to the administration of a particular program and are thus not used to measure the amount of benefits reaching minorities. Racial and ethnic data are also collected in some programs for use in characteristic studies of beneficiaries as in some programs of the Office of Education, Health Services and Mental Health Administration, and Social and Rehabilitation Service.

[37] At DOT, the Federal Aviation Administration provides assistance to State and local agencies for the development of airports, including assistance for planning, site acquisition, and construction; the Federal Highway Administration provides assistance to State highway departments for planning, construction, and improvement of highways; the Urban Mass Transit Administration provides assistance to State and local agencies for the planning, development, and construction of urban transportation service.

[38] Williams interview, *supra* note 23.

[39] The Capital Grant Program provides assistance to State and local public agencies for the development and improvement of public transportation.

[40] Funding of such facilities is made by HUD's Model Cities Program, Neighborhood Facilities Program, and Metropolitan Development Program.

[41] Interview with Laurence D. Pearl, Acting Director for Equal Opportunity in Mortgage Credit-Federal Housing and staff, Department of Housing and Urban Development, Sept. 16, 1971.

[42] These facilities include playgounds, boating and swimming facilities, camp grounds, hotels and resorts and visitor centers.

[43] Data are collected for only two groups, however; "minority" and "white." The quality of the data submitted by the forest ranger may vary. The data are submitted annually, and the ranger is not instructed to make his count on a particular day, nor is he instructed to keep a cumulative record of visitors to these sites. Interview with Albert McDowell, Civil Rights Coordinator, Forest Service, and Forest Service staff, Department of Agriculture, Aug. 3, 1971.

[44] The collection of applicant data is supported by the Mexican American Legal Defense and Education Fund and by Aspira of America. See letter from Mario G. Obledo, General Counsel, MALDEF, to Cynthia N. Graae, Federal Evaluation Division, Commission on Civil Rights, Feb. 4, 1972 and letter from Louis Nuñez, National Executive Director, Aspira of America, to Frank C. Carlucci, Associate Director, Office of Management and Budget, Feb. 8, 1972. Opposition to *applicant* data has been voiced by the National Urban League and the American Civil Liberties Union. See resolution adopted by the National Urban League, Racial Breakdowns in Statistical Information Collected by Public Agencies, Sept. 5, 1962; interview with James D. Williams, Director of Communication, National Urban League, Mar. 17, 1972, and Policy Statement of the American Civil Liberties Union, Collection and Dissemination of Racial and Religious Information, Jan. 13, 1968. While the NAACP and the Urban League generally oppose notations of race on individual records, both organizations are supportive of the compilation of aggregate statistics. See Section I, Note 14.

Also opposed to the collection of applicant, pre-employment, and pre-assistance data are the Fellowship Commission in Pennsylvania, American Jewish Congress, the National Jewish Community Relations Advisory Council, the American Jewish Committee and the Anti-Defamation League of B'nai B'rith. Interview with Maurice B. Fagen, Executive Director, Fellowship Commission, Jan. 28, 1972; letter from Joseph B. Robison, Director of Commission on Law and Social Action, American Jewish Congress to Cynthia N. Graae, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, May 26, 1972; interview with Arnold Aronson, Program Director, National Jewish Community Relations Advisory Council, May 24, 1972; interview with Harry Fleischman, Director of Race Relations and National Labor Service, American Jewish Committee, That the potential use of applicant data outweighs potential misuse has been affirmed by the Office of Management and Budget which stated:

> . . . it is recognized that in many situations Federal agencies need to find out the racial and ethnic identity of applicants to see whether members of minority groups are applying for employment, loans, veteran payments and other benefits to which they may be entitled, and if they are, whether there appears to be any evidence of discrimination in processing the application.[45]

Nevertheless, the Office of Management and Budget has not yet issued any governmentwide recommendations or requirements for the collection of applicant data.

Only one Agency studied, the Department of Labor, requires the collection of applicant data. It has specified that the Manpower Administration will require that racial and ethnic records are maintained for both its applicants and its beneficiaries.[46] Although racial and ethnic designations are recorded on application forms, data are not tabulated until the applicant has been accepted for participation in a program. Thus, there are no tabulations or analyses regarding unsuccessful or total applicants and no racial and ethnic comparisons are made between applicants and participants.[47]

3. ELIGIBILITY DATA

To assess the extent to which program benefits are reaching intended beneficiaries on an equitable basis, program officials must also know the race and ethnic origin of persons eligible to benefit from their programs. In the Agencies studied, there were almost no eligibility data available, which severely limits analyses of beneficiary data. The Department of Agriculture alone requires that the race and ethnic origin of eligible beneficiaries be determined.[48] This does not dictate that actual data collection by survey or head count be used to obtain eligibility data for USDA programs but does permit the use of data from the Censuses of Agriculture or Population.[49] Despite this requirement such data are not generally obtained by program officials.

Following meetings with the Subcommittee on Racial Data Collection, the Office of Equal Opportunity at USDA requested administrators of USDA constituent agencies to supply information on the use of participant and eligibility data.[50] Focus was placed on eligibility data and Agencies without eligibility data were encouraged to obtain them. Despite these efforts, the 1972 volume of *Participation in USDA Programs*, which is in preparation, will not reflect a significant increase in the collection of eligibility data over that reported in the 1971 volume.[51] In the summer of 1971, civil rights officials in the Department of Housing and Urban Development were considering the release of Secretary-level memorandum prescribing the uses of racial and ethnic data which would stress the importance of obtaining eligibility data,[52] but as of March 1972, this memorandum had not yet been issued.[53]

May 24, 1972; and interview with Albert Weiss, National Director of the Discrimination Department, Anti-Defamation League of B'nai B'rith, May 24, 1972.

[45] Office of Management and Budget, Clearance Office Manual, Rev. July 1971.

[46] Manpower Administration Order No. 18-71, *supra* note 33.

[47] Interview with Arthur Chapin, Director, Office of Equal Opportunity in Manpower Administration Programs, and Manpower Administration staff, Department of Labor, Sept. 17, 1971. An HEW program which collects data on the race and ethnic origin of applicants is the Federally Insured Student Loan Program. In this case, too, data on unsuccessful applicants are not forwarded to the program office. Interview with Jerald Donaway, Chief, Federally Insured Loan Section, Insured Loans Branch, Division of Student Financial Aid, Department of Health, Education, and Welfare, Jan. 22, 1971.

[48] Supplement No. 1 to the Secretary's Memorandum 1662, Department of Agriculture, July 27, 1970, requires that each constituent agency within the Department "establish measures of numbers of minority groups in the population eligible to participate in each program."

[49] For a further discussion of the problems inherent in using data from nonprogram sources, see Section II. D. 2. Use of such data can eliminate the need for costly and time consuming surveys.

[50] Memorandum from Percy R. Luney, Chief, Program Evaluation Unit, Office of Equal Opportunity, Department of Agriculture, to Morton H. Sklar, Chairman, Racial Collection Subcommittee, July 21, 1971. A similar request was made in 1971, resulting in the USDA publication, *Participation in USDA Programs by Ethnic Groups*, July 1971.

[51] Interview with Percy R Luney, Chief, Program Evaluation Unit, Office of Equal Opportunity, Department of Agriculture, March 1, 1972.

[52] Pearl interview. *supra* note 41.

[53] Discussions on this issue have been held with the HUD Equal Opportunity Office and OMB, as well as with the Deputy Under Secretary's Office. In a forthcoming reorganization of HUD, a special division of data analysis will be established. At this point, however, although the plan for a Secretary-level memorandum has not been discarded, there are no active preparations for its issuance. Interview with Laurence D. Pearl, Mar. 16, 1972.

4. BENEFIT RECEIVED

In assessing the distribution of Federal benefits, it is essential to examine the amount of benefit received by members of each minority group. This, for example, would include the size of a loan, the number of hours of training or counseling given, the number of job referrals made, or the dollar value of the services provided. Variables affecting benefit value must also be calculated, such as interest rate, number of years for repayment of a loan, frequency of training of counseling sessions, as well as the extent services are provided across racial lines.[54] Similarly, changes in benefit, such as increases, decreases, or terminations, must be examined for each racial and ethnic group. The impact of program benefits, such as increase in reading rate, improvement in nutrition, or alterations in pollution level should be measured for each racial and ethnic group.

Both the Departments of Health, Education, and Welfare, and Labor regularly produce program benefit data. At the former, programs are required to submit data on the distribution of total program dollars by racial and ethnic origin of the beneficiaries.[55] The meaning of these data, however, is dubious. Without parallel information on the total need or total number of beneficiaries in each racial and ethnic group, there are few means to assess the extent of equitable benefit distribution. The Manpower Administration (DOL) requires that data be collected concerning the State employment agency services, the nature of referrals, and the kind and duration of training. While the Manpower Administration also collects information on the race and ethnic origin of the employees of State employment services, this information is not analyzed in conjunction with beneficiary data and, thus, no analysis of service across racial lines is done.[56]

The only requirement for data on program benefits at the Department of Agriculture is a requirement for obtaining data measuring the extent of services across racial lines[57] but even these data are not generally collected. Collection and use of benefit data are *ad hoc* and infrequent in all other Agencies.

5. CHARACTERISTIC DATA

To determine whether or not benefit distribution is commensurate with minority group needs and whether or not eligibility requirements are implemented equitably, data on personal characteristics reflecting both program need[58] and eligibility[59] must be recorded. The essential variables depend upon the benefit offered and eligibility criteria.

Such data are frequently collected with regard to the routine administration of Federal programs[60] and could be used in conjunction with racial and ethnic data[61] to measure nondiscrimination in Federal programs. Currently, however, they are rarely collected for use in measurement of equal opportunity in Federal programs. Of the Agencies studied, only the Department of Labor collects such information on a regular basis and in conjunction with racial and ethnic data.[62]

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[54] Where segregated services have been maintained there has been an effect on the quality of services provided to minorities and an effect on minority participation. Although there are many instances in which there is a need for persons familiar with the culture or language of a minority group to provide services to that group, the need is for bilingual or bicultural (or multilingual or multicultural) services and not for segregated services.

[55] Hope interview, *supra* note 36. See also Department of Health, Education, and Welfare The *Long Range Planning Structure*, (Blue Book) 1971.

[56] Chapin interview, *supra* note 47.

[57] Secretary's Memorandum 1662, Supplement No. 1, *supra* note 33.

[58] E.g., data on level of skill and education of participants in a training program are important factors relating to the needs of the participants in that program.

[59] E.g., income level relates to the ability to repay a loan, and thus may be a criteria for eligibility for home mortgage loans. Such factors as income, education level, and age may at times relate to the need for a particular program and in others, relate to eligibility for participation. Thus, income may also relate to need for participation, as in the food stamp or welfare programs.

[60] Interview with Fred Branan, Deputy Director, Research and Reports Liaison Staff, Compensation, Pension, and Education Service, Veterans Administration, Aug. 13, 1971; interview with Frank Hanmer, Budget Officer, Assistance Payments Administration, HEW, Aug. 23, 1971; interview with Betty Burnside, Chief, Assistance Payments Studies Section, HEW, Aug. 25, 1971; interview with Stanley Glaser, Reports Clearance Officer, Health Services and Mental Health Administration, HEW, Aug. 27, 1971.

[61] Characteristic data such as age, sex, income, education level, and employment are frequently included when information about beneficiaries is collected. Such information can be used in conjunction with racial and ethnic data in describing the beneficiary population in terms of its need, qualification for assistance, or for purposes of comparison with the target population.

[62] Chapin interview, *supra* note 47.

C. RACIAL AND ETHNIC CATEGORIES

1. Major Classifications

a. Asian American/Oriental

Although most Federal Agencies use the term "Oriental", there is preference for the term "Asian American".[63] Generally included in this group are Chinese, Japanese, Filipinos, Samoans, and Koreans. There is some controversy over the inclusion of Hawaiians and Guamanians[64] in this group. The Bureau of the Census cautions that Hawaiians are Polynesians and not "Orientals".[65] The use of the term "Asian American", however, is used to include Polynesians.[66] There are about 1.4 million Japanese, Chinese, and Filipinos in this country, less than 1 percent of the total population.[67]

There is no official count of the number of Samoans or Koreans.[68] Asian Americans tend to be concentrated in particular geographic areas, primarily Los Angeles, San Francisco, Seattle, and Chicago, and thus their enumeration is particularly important in regard to statistics collected in these localities.

In many instances there is need for separate enumeration of Chinese, Japanese, Filipino, Samoan, and Korean groups because the problems faced by each are unique.[69] For example, in California, Filipino males aged 14 and over have the lowest median income of all racial and ethnic groups,[70] a problem which would be obscured if employment data for all Asian Americans were combined.

b. Native American/American Indian

Most Federal Agencies use the term "American Indian" but "Native American" has gained increasing popularity, especially with members of this ethnic group.[71] While in some instances Agencies have included Aleuts and Eskimos within this classification, the Bureau of the Census does not agree and retains separate categories for all three groups.[72]

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[63] Interview with Toyo Biddle, Coordinator for Asian American Affairs, Department of Health, Education, and Welfare, Nov. 29, 1971. The Department of Health, Education, and Welfare has established the position of Coordinator of Asian American Affairs within the Office of the Secretary.

The Japanese American Citizen's League has prepared a proposal for a Cabinet Committee on "Asian American" affairs. Chinese for Affirmative Action refer to "Asian Americans". Letter from L. Ling-Chi Wang, Executive Director, Chinese for Affirmative Action, to Cynthia N. Graae, Federal Evaluation Division, U.S. Commission on Civil Rights, Apr. 20, 1972.

The issue of terminology to be used with regard to minority group membership is mentioned here because it is one which is frequently raised in the course of efforts to establish racial and ethnic data collection systems. It is, however, considerably less important than the question of how membership in a particular group is to be defined, or the question of which group should be separately identified.

[64] Guamanians are Micronesians, coming from the Mariana Islands in the Pacific. A large number, who are economically depressed, are located in southern California.

[65] Interview with Tobia Bressler, Chief, and staff, Ethnic Origins Statistics Branch, Bureau of the Census, Department of Commerce, July 28, 1971.

[66] See, for example, White House Conference on Aging, Report of the Special Concern Session on the Asian American Elderly; 1971.

[67] 1970 Population Counts by Race, announced by the Bureau of the Census, Oct. 20, 1971. See Subcommittee on Census and Statistics of the Committee on Post Office and Civil Service, 91st Congress 2nd Sess., Report on Accuracy of the 1970 Census Enumeration (1970), for a discussion of undercounts of minority groups in the 1970 census.

[68] Data published from the 1969 Census of Population did not include separate figures for Koreans or Samoans, except as components of the "all other" category. To date, no figures have been published for Koreans or Samoans based on the 1970 decennial census data. Tentatively, the Bureau of the Census plans to publish population totals for Koreans in November 1972. Samoans will again be included in the category of "all others". Interview with Patricia Berman, Statistician (Demography), Ethnic Origins Statistics Branch, Population Division, Bureau of the Census, May 16, 1972.

[69] Separation of data for the major Asian American groups is supported by the Bureau of the Census (BOC) which does not favor combining data for Chinese and Japanese. It argues that Chinese and Japanese are distinct, with different education and income levels, and different needs for Federal assistance. Consequently, the Bureau of the Census does not use the term "Oriental," Bressler interview, *supra* note 65.

[70] State of California, Department of Industrial Relations, Division of Fair Employment Practices, *Californians of Japanese, Chinese and Filipino Ancestry*, June 1965.

[71] The American Indian youth organization is called "Native American Student Alliance". Other organizations using this term include United Native Americans, a nationwide organization, and the Native American Legal Rights Fund, an American Indian legal services agency. According to Jack Forbes, Professor of Native American Studies, University of California at Davis, the majority of American Indian studies programs are called Native American Studies, for example at the branches of the University of California at Berkeley and at Davis. Interview with Jack D. Forbes, Professor of Native American Studies, University of California at Davis, Jan. 11, 1972.

[72] Bressler interview, *supra* note 65. The HEW Office of Planning and Evaluation, for example, combines American Indians, Aleuts, and Eskimos. (The HEW Office for Civil Rights collects separate data for Indians, Eskimos, and Aleuts in Alaska.)

According to the 1970 census, there are about 800,000 American Indians in this country.[73] They are located throughout the United States although are found primarily in the States of New Mexico, Oklahoma, Arizona, and California.[74]

In many instances there is need for greater distinctions in data collected than for aggregate data on "American Indians". The Bureau of the Census asks American Indians to indicate their tribe on census forms. It has identified about 100 "tribes" although in some cases these are actually language groups which are comprised of several smaller tribes.[75] American Indian groups, too, note the significance of data on individual tribes. Such information would be particularly relevant in conjunction with education, health and social services. For example, a school instituting a Native American studies program would need to know the tribal origin of its pupils to plan a program with particular relevance for them. Similarly, social agencies with American Indian beneficiaries need information on the tribal origin of its beneficiaries in order to eliminate any linguistic or cultural barriers to the application for or use of its services.[76]

c. Spanish Surnamed/Spanish Speaking/Spanish Origin/Spanish American

There is considerable controversy about what this group should be called. The term "Spanish surnamed"[77] has been used by the Bureau of the Census in its publication of statistics for this group in the Southwest.[78] The term "Spanish speaking" occurs in the title of the Federal Cabinet Committee on Opportunities for Spanish Speaking People.[79] The term "Spanish American" is used in the categories set forth by the Department of Housing and Urban Development.[80] The term "Spanish origin" was used by the Bureau of the Census in a 1971 report on population characteristics.[81]

Objections to such terms as "Spanish surnamed" and "Spanish speaking" are that they relate to characteristics which do not accurately define group membership. Not all members of the group have Spanish surnames, for example, and a significant number of persons with Spanish surnames are not members of this group.[82] Similarly, not all members of this group speak Spanish and not all Spanish speaking persons are members of this group.[83]

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[73] *Population Counts by Race, supra* note 67. Experts on Native Americans, however, argue that, despite the large increase in this figure from the 1950 census total of about 300,000, this figure still represents a significant undercount of Native Americans in this country. They argue that the use of the term "race" by the Bureau of the Census was confusing to many respondents, who consider this "social group" but not their race to be American Indian. Forbes interview, *supra* note 71. This figure of 800,000 has been estimated as an undercount of at least 500,000 by persons who have compared census data on counties with estimates made by tribes in these counties. Reasons for this undercount are that American Indians near the border fear deportation and that American Indians in the cities often see no reason for identifying themselves as Indian. Interview with Alexander McNabb, Director of Engineering and Construction, Bureau of Indian Affairs, Department of the Interior, Mar. 16, 1972.

[74] U.S. Department of the Interior, Bureau of Indian Affairs. "Preliminary 1970 Census Counts of American Indians and Alaska Natives."

[75] Bressler interview, *supra* note 65.

[76] Forbes interview, *supra* note 71.

[77] Unless otherwise indicated, in this report the use of the term "Spanish surnamed" refers to individuals of Spanish, Mexican, Cuban, Puerto Rican, or Central or South American origin, and is sometimes used interchangeably with the term "Spanish speaking", "Spanish speaking background", or "Spanish American".

[78] U.S. Bureau of the Census, *U.S. Census of Population: 1960, Subject Reports. Persons of Spanish Surname*, 1963. In this case, the term "Spanish Surnamed" referred to persons whose surnames were on a Bureau of the Census list of Spanish surnames.

Following pressure from the Spanish speaking community, including pressure from the Cabinet Committee on Opportunities for Spanish Speaking People, to enumerate this group separately in the decennial Census, during the summer of 1971 the Bureau of the Census designed a survey to determine what members of this group prefer to be called. As of March 1972, BOC did not have the results of this survey. Bressler interview, *supra* note 65.

[79] The Cabinet Committee on Opportunities for Spanish Speaking People was established from the Former Interagency Committee on Mexican American Affairs by Congress on Dec. 30, 1969, 42 U.S.C. 4301 (1969). Included in its mandate is to insure that Mexican Americans, Puerto Ricans, Cubans, and other Latin Americans are receiving the Federal assistance they need and to promote new programs to deal with the unique problems of the Spanish speaking community.

[80] Department of Housing and Urban Development, Handbook 2160.5, *Reports Management Systems*, Apr. 1970.

[81] Bureau of the Census, Current Population Reports, *Population Characteristics*, "Persons of Spanish Origin in the United States: November 1969", February 1971.

[82] Many Philipinos and many American Indians have Spanish surnames. For a further discussion of identification of group membership by examination of surnames, see section I. D. 2.

[83] In November 1969, 9.2 million persons classified themselves as of Spanish origin. Only 6.7 million persons re-

As used by most Federal Agencies, the terms "Spanish speaking" and "Spanish surnamed" refer not only to those persons who speak Spanish or have Spanish surnames but to all persons from a Spanish speaking background. For example, the Department of Labor identifies as Spanish surnamed, persons whose "appearance or speech is characteristic of that group," making no reference to the last names of the individuals in the group.[84] Similarly in the HEW Fall 1968 Elementary and Secondary School Survey "Spanish surnamed" was defined as "persons considered in school, or community to be of Mexican American, Central American, Cuban, Puerto Rican, Latin American or other Spanish speaking origin.[85] The HEW Office of the Assistant Secretary, classifies as "Spanish surnamed" persons who so identify themselves or whose language, place of birth, or origin of parents are common to Spanish origin groups.[86]

In general, regardless of what term is applied to describe this group, the criterion for inclusion is membership by birth or ancestry in any of the specific national origin groups which are of Spanish heritage, as measured by any of several characteristics such as language, cultural identification, or place of birth.

There are about 9.2 millions persons of Spanish origin in this country.[87] They do not constitute a single group, but may be members of several groups, including Mexican Americans (2.5 percent of the U.S. population), Puerto Ricans (.7 percent of the U.S. population) and Cubans (.3 percent of the U.S. population) as well as persons of Central, South American, or other Spanish origin (.9 percent of the U.S. population.)[88] Lack of separate statistics[89] for these groups has presented problems for each of them. Difficulty in mentioning the extent of affirmative action to remedy past discrimination against Mexican Americans or Puerto Ricans and difficulty in documenting their distinct needs and problems in the areas of social services, education, and employment[90] have compounded the problem. The Cabinet Committee on Opportunities for Spanish Speaking People has made many requests from Federal Agencies concerning the extent to which program benefits are reaching Spanish surnamed persons, and in each case it has requested separate enumeration of data for Puerto Ricans, Mexican Americans, and Cubans.[91]

d. Negro/Black

For many years the Bureau of the Census used the term "Negro" to describe this group; it used the term "Negro/Black" for the first time in 1970 without changing the criteria used for inclusion in this group. Other Federal Agencies are also beginning to use the term "black", and HUD, HEW, and USDA have all prescribed the use of "Negro/black".[92] Blacks comprise 11.1 percent of the United

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ported Spanish as their mother tongue, and 4.6 million reported Spanish as their current language. About .1 million persons not of Spanish origin reported Spanish as their current language. "Persons of Spanish Origin in the United States; November 1969," *supra* note 81.

[84] United States Employment Service Program Letter No. 2238, Department of Labor, June 23, 1967.

[85] HEW Form OS/CR 101, School System Report.

[86] Department of Health, Education, and Welfare, *Long Range Planning System, Program Planning Structure*, (Blue Book), 1971.

[87] This figure, taken from the U.S. Bureau of the Census, *Current Population Reports*, Series P-20, No. 224, October 1971, has been alleged to be an undercount. The Cabinet Committee on Opportunities for Spanish Speaking People estimates in its Annual Report, Fiscal Year 1971, that 12 million persons in the country are of Spanish speaking background.

Among the defects in Census Bureau methodology is its failure to issue survey forms in Spanish within the continental United States, the use of surname counts as a principal means of estimating the size of this population, and the enumeration as Puerto Rican only those Puerto Ricans born in, or whose parents were born in, Puerto Rico. (See U.S. Dept. of Commerce, Bureau of the Census, Statistics on the U.S. Puerto Rican Population, released May 23, 1972.)

[88] *Id.* Table 1.

[89] In the Agencies studied, only the Manpower Administration (DOL) regularly collects separate data for Mexican Americans, Puerto Ricans, and other persons of Spanish heritage. In the Public Employment Program (assistance to State employment agencies) data are collected for all Spanish surnamed groups combined. In most other programs, e.g., the concentrated Employment and Work Incentive Programs, separate data are collected for Mexican American, Puerto Ricans, and others.

[90] See, for example, Letter from Mario G. Obledo, General Counsel, Mexican American Legal Defense and Education Fund, to Cynthia N. Graae, Federal Evaluation Division, U.S. Commission on Civil Rights, Feb. 4, 1972.

[91] Interview with Diana Lozano, Personal Assistant to the Chairman, Cabinet Committee on Opportunity for Spanish Speaking People, Dec. 9, 1971.

[92] The term "Afro American" is also used, especially by universities with regard to Afro-American studies programs, and by black newspapers. Both the terms "black" and "Afro-American", while they have gained a recent increase in popularity, have been used by some since the turn of the century. See, for example, Thomas Gilbert, *Race Distinctions in American Law*, 1910. For reference to a variety of terms used in regard to this ethnic group see Andrew Szabo, *Afro-American Bibliography*, 1970; in addition to the terms

States population[93] almost two-thirds of all minority group membership in the country.[94]

e. All Other Minority Groups

When "all other" minority groups are not separately enumerated, either no data will be collected on them or they will be combined with the "white" category. Because the numbers of persons in all other groups constitute less than .5 percent of the Nation's population,[95] it might be argued that combining these data with data for whites presents no problem since it will not substantially affect the data for whites. While this may be true on a national level, when examining the data for certain geographical areas, the inclusion of data on "others" may have a significant effect upon the data for whites.[96]

More important, in areas in which "other" groups comprise a significant proportion of the population, data on the participation of these groups in Federal programs will be crucial to the measurement of nondiscrimination. Without a category for "other" minorities, there will be no data showing the extent to which these groups are participating in Federal programs or demonstrating their need for program benefits.

As used by most Federal Agencies, "other" minority groups include Polynesians, Aleuts, Eskimos, and Creoles. Since there have been no comprehensive instructions issued by any Agency studied on the use of this category, it is not known if "other" is applied to national origin groups such as Italians, Poles, Slavs, or Portuguese. These groups are concentrated in given localities and are frequently distinguished from the larger community by language or customs, as, for example, the Portuguese and French Canadian communities in New England. They may have special needs, such as for bilingual education or for bilingual counselors and doctors. If two or more "other" groups reside in a given geographic area as in Alaska, even the use of an "other" category may not be sufficient to display data on program beneficiaries. In such instances, the use of only a single category for "all other" groups could result in the combination of groups with diverse characteristics, needs, and problems.[97] Although numbers in any of these groups may be too small to require separate enumeration on a national scale, local requisites for data with regard to these groups may be significant. Programs should be encouraged to collect data to meet program needs in the geographical area, regardless of the national categories. To date, however, most program managers have not made provisions for these measurements at the local level. This results in a severe dearth of information for compliance review or affirmative action with respect to these groups. The Department of Housing and Urban Development is the only Agency studied which has issued instructions concerning this problem. It has required that additional categories be used when proper program administration necessitates more detail about minority groups than the six major categories prescribed.[98]

f. White

There is also some controversy as to what this group should be called. The term "white" has been used as a racial/color designation and, as such, has been used to include Spanish surnamed persons. When the purpose of racial and ethnic data collection is to measure the extent program benefits are reaching minority group persons, the inclusion of Spanish surnamed persons in the "white" category would impede the purposes of the survey. Confusion has resulted with regard to the use of this category within Federal programs because of the precedent of including Spanish surnamed persons in the census category of "white".[99] Without explicit instructions, it may be difficult to know whether or not the in-

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already cited, reference is made to "Black American", "Negro American", and "American Negro".

[93] U.S. Population Counts by Race, announced by the Bureau of the Census, Oct. 20, 1971.

[94] Calculated from the U.S. Bureau of the Census Population Counts by Race, announced by the Bureau of the Census, October 1971, and from the U.S. Bureau of the Census, *Current Population Reports*, Series P-20, No. 224, October 1971.

[95] 1970 Population Counts by Race, announced by the Bureau of the Census, Oct. 20, 1971.

[96] For example, in Hawaii and Alaska, "other" minorities comprise more than 10 percent of the population.

[97] For example, combining Aleuts, Eskimos, and the white population in Alaska would result in no meaningful racial and ethnic data for the entire State.

[98] Department of Housing and Urban Development, Transmittal Memorandum to Handbook 2160.5 Reports Management Systems, Apr. 15, 1970. It should be noted that this directive would also apply to the separate enumeration of Spanish surname groups, Asian American groups, or American Indian tribes.

[99] For example, as a result of lack of instructions by DOT, when data were collected only for "whites" and "nonwhites" in statistics collected by the Federal Highway Administra-

clusion of Spanish surnamed persons in this category is intended.

2. THE OFFICE OF MANAGEMENT AND BUDGET POLICY

Limited direction relating to the racial or ethnic categories which should be used in Federal statistics has been provided by the Office of Management and Budget[100] in Exhibit K to Circular A-46, "Race and Color Designations in Federal Statistics".[101] Exhibit K establishes permissible designations of race or color in Federal statistics. Explicitly prohibited is the term "nonwhite". The terms "Negro", "white", and "other races" are listed as allowable. Although it is clear from the policy that Federal data collection is not restricted to these three categories, no terminology is prescribed for any other racial or ethnic group.

Thus, the OMB policy refers to the terminology to be used in the collection of data on only one minority group, Negro. It does not require the collection of racial and ethnic data or the separate enumeration of any particular racial and ethnic groups when racial and ethnic data are collected. The issue of racial and ethnic discrimination, however, extends to many minority groups. Allegations of discrimination in the distribution of Federal assistance are not limited to those by blacks, but have been raised by other groups, including American Indians, Asian Americans, and Spanish surnamed Americans.

Even in the establishment of acceptable designations of race or ethnic origin in Federal statistics, OMB policy is inadequate because it does not prescribe the separate enumeration of any group. For example, there is no requirement that data for blacks or whites be enumerated separately: both the categories "Negro and other races" and "white and other races" are permissible. Further, this circular does not provide definitions of the terminology it sets forth, and provides no guidance on whether Spanish surnamed[102] groups should be included in the "white" category.

OMB has recognized the inadequacies of its policy on racial and color designations in Federal statistics. Aware of the need for standardization of designations for several racial and ethnic groups, OMB began studying the situation in the late summer of 1971. It has drafted standardized racial and ethnic categories and plans to issue a supplement to Circular A-46 in the near future to reconcile conflicting Agency reporting requirements.[103]

3. USDA, HEW, HUD, DOL, DOT, AND VA POLICY

Although the exact terminology varies slightly among USDA, HEW, and HUD, six categories have been identified white, Negro/black, Spanish surnamed, American Indian, Oriental, and others.[104]

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tion, there may have been little uniformity with regard to the classification of Spanish surnamed persons within these two categories. Interview with Alexander Gaither, Director of Civil Rights, Federal Highway Administration and Federal Highway Administration staff, Sept. 9, 1971.

[100] Authority to issue regulations on Federal statistical procedures was given to the Bureau of the Budget through Executive Order 10253, June 13, 1951. The responsibilities of the Bureau of the Budget were transferred to OMB under Reorganization Plan No. 2 of 1970. For a further discussion of the statistical responsibilities of the Office of Management and Budget, see Section III, B.

[101] Circular A-46 sets forth procedures to be followed throughout Federal Departments and Agencies to improve the gathering, compiling, analyzing, publishing, and disseminating of statistical information for any purpose. It was issued on Mar. 28, 1952, by the Bureau of the Budget, the predecessor of OMB. Exhibit K was issued on Aug. 8, 1969.

[102] *Id.* (Transmittal memorandum)

[103] Letter from Mark W. Alger, Chief, General Government Programs Division, Office of Management and Budget to Jeffrey M. Miller, Chief, Federal Evaluation Division, U.S. Commission on Civil Rights, Aug. 13, 1971, and response of the Office of Management and Budget to the Sept. 14, 1971 inquiry by the U.S. Commission on Civil Rights. In March 1972 proposed revisions were issued to Federal Agencies for comment. See Section III, B for the content of these revisions and a discussion of their limitations.

[104] "Others" are minority groups not specifically identified by Agency policy, generally including such peoples as Polynesians, Aleuts, Eskimos, and Creoles. The basic documents outlining Agency policy with regard to categories for racial and ethnic data collection are: USDA, Secretary's Memorandum 1662, Supplement No. 1, July 27, 1970; *supra* note 86; *Long Range Program Planning System;* HUD, Transmittal Memorandum to HUD Handbook 2160.5, *supra* note 98; DOL, General Administration Letter No. 1448—Change 1, Mar. 15, 1972. (Because this standardization is recent, information used in the above text about DOL categories was taken from forms used in the administration of the public employment program and from Manpower Administration training programs.) The current policy calls for the identification of four "ethnic groups": Caucasian, Negro, Oriental, and American Indian, and for the identification of the following "minority groups" where they are concentrated in certain areas: Cuban, Mexican, Puerto Rican, Spanish, Aleut, Eskimo, French Canadian, Japanese, Chinese, Filipino, Korean, Polynesian, Indonesian, and Hawaiian.

These Agencies all require the separate identification of five of these categories: Negro or black, Spanish surnamed or Spanish American, American Indian, Oriental and others. All Agencies but HEW list *"white" as a separate* category; HEW includes this group in the category "other". HUD is the only Agency which provides definitions of the categories to be used.[105]

DOL, HEW, HUD, and USDA categories are specified in official policies regarding departmental data collection requirements. HEW's policy prescribes the categories to be used in submitting data, obtained by collection, from records or by estimates, to the Office of the Assistant Secretary for Planning Evaluation.[106] The Department of Transportation and the Veterans Administration have no such policies.

For maximum utility, racial and ethnic data collection should be consistent throughout the Federal Government[107] to make comparisons available over periods of time and among Agencies. Consistency facilitates sharing of data and this is important both in reducing redundancy in data collection and increasing the utility of Agencies' statistics. Certain types of programs, for example those which make loans for housing,[108] are common to several Agencies. They could share data if they used similar or identical racial and ethnic categories.

Although several Agencies maintain policies regarding racial and ethnic categories, throughout the Government there is little consistency in the categories used. The absence of policy, such as in the Department of Transportation and in the Veterans Administration, has contributed to this inconsistency. The small amount of data collected by DOT and VA are generally collected for the categories "black", "white", or "other" or even "white" and "nonwhite".[109] There are little data in these Agencies on persons of Spanish descent, Asian Americans, or American Indians. In addition, because of lack of implementation there is inconsistency within the Agencies which have such policies.

The Social Security Administration (HEW) uses the categories of "Negro", "white", and "other" rather than collecting data in the categories required for submission to the Office of the Assistant Secretary for Planning and Evaluation. It resists changing these categories, arguing that a current expansion of the categories used would not be reflected in tabulations for about 40 years.[110] This argument ignores several facts. Applicants for Social Security benefits made at the time of retirement are also required to complete forms, which are revised from time to time by the Social Security Administration and which could be amended to include questions about race or ethnic origin. Although the Social Security Administration itself is primarily interested in beneficiaries of its own programs, who are often over 65, its data bank, one of the largest in the Federal Government on social security card holders, is used by many Federal Agencies, such as the Department of Labor. These Agencies may well have an interest in racial and ethnic data on Social Security card holders of any age.

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[105] The definitions provided by HUD are: Oriental: Chinese, Filipino, Japanese, and Korean; Spanish American: Puerto Rican, Cuban, Mexican, Latin American, Other Spanish, and Iberian; Other minorities: Eskimo, Aleut, Hawaiian, part Hawaiian, Polynesian, and Micronesian; white: nonminority. Transmittal Notice to Handbook 2160.5, *supra* note 98.

[106] HEW does not require actual data collection for any racial or ethnic groups; this is of particular note since the requirements for submission of data at HEW permit proration on some "reasonable basis." See the *Long Range Planning System; Program Planning Structure, supra* note 86 at 64. Thus, there may be no actual data collection for one or more categories prescribed; instead data may be obtained by estimates. For example, the Social Security Administration collects data on "black", "white", and "other" from applicants for Social Security cards; data for other minorities are based upon estimates from census data. Interview with Tom Staples, Special Assistant, Office of the Assistant Commissioner, and Robert N. Heller, Special Assistant for Liaison with Users of Social Security Data, Social Security Administration, HEW, Aug. 25, 1971.

[107] One problem in creating standardized racial and ethnic categories for use throughout the Federal Government is that requirements for consistency over time and among Agencies may conflict. For example, a governmentwide requirement that the categories of black, Spanish surname, American Indian, Negro, Oriental, and other would destroy comparability within Social Security data which use the category of white, black, and other. The Social Security category of white currently includes Spanish surnamed persons. The category "other" includes Polynesians. The hypothetical reporting system would group Polynesians with whites in the category "other". The time series would thus be destroyed as data comparable to the former category of "white" could not be obtained by combining the new categories of Spanish surnamed and "other". Agencies collecting data over a period of years try to maintain uniformity in those data. Governmentwide standardization may curtail that uniformity. One goal of standardization must, therefore, be to achieve some degree of comparability with existing data series.

[108] Housing loans are made by the Veterans Administration, the Department of Housing and Urban Development, and the Department of Agriculture. Data for program administration are shared among these Agencies. See HUD *Annual Reports*, 1971, which contains data collected by the Veterans Administration and the Departments of Commerce and Labor.

[109] For example, data with such restricted categories are collected by the Department of Medicine and Surgery of the Veterans Administration and by the Federal Highway Administration. Interview with Bernard Kaufman, Director of Reports and Statistics, and J. Herbert Smith, M.D., Deputy for Professional Services, Department of Medicine and Surgery, Veterans Administration, Aug. 4, 1971, and Gaither interview, *supra* note 99.

[110] Race is first identified on the application for a Social Security card. Since Social Security cards are required not only in connection with employment, but also with opening

Finally, there is a need for racial and ethnic data on current applications for Social Security cards.[111] Without such data, the Social Security Administration will not know the extent to which applications for Social Security cards are made by all racial and ethnic groups. In the event that a particular group is not making applications or paying into the Social Security account as frequently as would be expected on the basis of population statistics, the reasons for this disparity should be explored.[112] If racial and ethnic data are not tabulated until actual receipt of Social Security benefits, it might be too late for the Social Security Administration to provide benefits to those persons who never did, but should have, applied for Social Security cards.

The Rural Electrification Administration (USDA)[113] collects racial and ethnic information only for whites and all others. It cites the cost of revising its forms as the reasons for its failure to use all six categories prescribed by the Department of Agriculture.[114] The current forms used by REA to collect racial data were designed, however, after the Secretary's memorandum was issued specifying the categories to be used.

Inconsistency among the categories used in Federal statistics is even greater when other Agencies such as the Bureau of the Census are examined. Of comparable importance is the data resulting from the census, which are often used by Federal Agencies as a basis for program planning or as a basis for comparison with program data and consistency between census data and data collected by Federal programs. The categories used in the 1970 Census of Population were "white", "Negro or black", "American Indian" (by tribe), "Japanese", "Chinese", "Filipino", "Hawaiian", "Korean", and "other".[115] The census forms intended for 100 percent of the population did not include a Spanish descent category,[116] yet data on persons of Spanish descent are used by HEW, HUD, USDA, and DOL; these Agencies might have wished to use census data to obtain estimates of their Spanish descent target populations.

The Civil Service Commission (CSC), which collects data concerning the race and ethnic origin of Federal employees is another Agency with data which might be useful in conjunction with Federal programs. These might be used as part of the Federal effort to determine the extent to which staff members in field offices are available to meet the special needs of minority beneficiaries. CSC data are collected for the categories of "Negro", "Spanish American", "American Indian", "Oriental", "Aleut", (in Alaska), "Eskimo" (in Alaska), and "none of these".[117] There is no separate category for "white" and, thus, in particular localities comparison between

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bank accounts and purchasing stock, applications for Social Security cards are sometimes made in infancy, and, at any rate, by the time of first employment. Distribution of Social Security pension benefits, however, is not usually made until retirement. In 1965-66, 12.0 percent of all Social Security cards issued were to children under 14 years of age; 62.4 percent of all issuances went to the 14 to 19 year old group. See, HEW, Social Security Administration, "Issuances of Social Security Account Numbers, 1966," October 1967.

[111] Note again that there is a distinction made here between application for Social Security cards and Social Security benefits.

[112] In some occupations, such as domestic and farm work, although it may generally be required that earnings be reported, a pattern of nonreporting of earnings may work to the detriment of the employees, who in particular geographic area may often be largely of one minority group.

[113] The Rural Electrification Administration (REA) makes loans to rural cooperatives for the installation of telephone and electrical lines.

[114] Interview with David A. Hamil, Administrator, and staff, Rural Electrification Administration, Department of Agriculture, Aug. 13, 1971.

[115] These categories were included on the form used for 100 percent of the population. Bureau of the Census, Department of Commerce, Form D-60, 1970.

[116] Respondents were given an opportunity to include Spanish origin or heritage on the survey form used for the 5 percent sample of the United States population in 1970.

[117] Federal Personnel Manual (FPM) System Letter 290-2, Sept. 30, 1969. This FPM letter provides complete instructions for the implementation of a continuously operating racial and ethnic data collection system, which separates racial and ethnic designations from names.

these data and data collected by HUD, DOL, and USDA would be difficult.

4. SEPARATION OF RACE, COLOR, ETHNICITY, AND NATIONAL ORIGIN

One of the problems in compiling a list of racial and ethnic groups for separate identification is that, among the terms commonly used to identify the largest racial and ethnic groups, there are mixtures of racial, color, ethnic, and national origin designations. The term "Negro", for example, might be considered as a racial classification. The term "white" relates to color but is frequently used to describe a race. The terms "Asian American" and "Spanish American" or "origin" relate to national origin, and the term "American Indian" relates to an ethnic group. As such, these terms are not necessarily mutually exclusive and it might be argued that a Negro with white skin or an American Indian born and educated in Mexico might have difficulty in selecting his or her own identification from such a list of categories which considered these criteria. Unless classifications are made along a single dimension of race, color, national origin, or ethnic group, there will be confusions in actual data collection.[118]

While, at first glance, this may not seem to be a particularly important issue, it is significant because it is often a stumbling block in the development of a racial and ethnic statistical system. In many Federal Agencies, statisticians have spent a good deal of time developing a multidimensional system of data collection which would enable separate enumeration of race and color, race and ethnic group, or color and national origin.[119]

Exhibit K to OMB Circular A-46[120] was written to eliminate the confusion which arose because of the use of "white" both as a racial and as a color designation, emphasizing the use of "white" as a racial designation, eliminating the use of "white" as a color designation and prohibiting the use of the term "nonwhite".[121] Further, in specifying the appropriate use of racial and ethnic designations, OMB stated that "ethnic and racial classifications are distinct and reviewers should not . . . attempt to mix these two concepts".[122]

Confusion has also arisen when a list of categories has provided a choice between a racial or color group and a national origin or ethnic group. This problem has been particularly acute with regard to Spanish surnamed persons who, in terms of actual skin color, may be white, brown, or black, and who in some instances have historically expressed a preference for racial or color classification as whites. This preference came into focus in the 1940 census when the Mexican Government made a request to the United States that Mexicans be enumerated as a race with whites and not as "color colored" as had been intended by the Bureau of the Census. This request was honored by the United States,[123] but resulted in a lack of data on this group. In recent years, however, particular needs have been expressed for data on Spanish surnamed and on Mexican Americans both by members of the group and by Federal Agencies. Separate data on the white majority, excluding Spanish surnamed persons, is also required for purposes of comparison.

Similar problems in classification of Puerto Ricans have arisen. When minority groups are designated only by race or color, some Puerto Ricans could be considered black and some white. In general, however, when offered a choice of the categories "white", "black", or "Puerto Ricans", this group prefers to be designated as "Puerto Rican". Federal Agencies, too, have generally classified Puerto Ricans on the basis of national origin rather than on the basis of color.[124] For example, the Department of Labor has provided the specific instruction that in the instance of membership in both the Negro and Spanish surnamed groups, only membership in the Spanish surnamed group is to be indicated.[125]

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[118] Interview with Milo Sunderhauf, Analytical Statistician, Office of Management and Budget, Aug. 7, 1971.

[119] *Id.* See also Department of Labor, U.S. Employment Service Program Letter No. 2238, June 23, 1967. The Office for Civil Rights at HEW has considered and rejected two dimensional data collection system.

[120] Office of Management and Budget, Circular A-46, Exhibit K, *supra* note 101. See also OMB proposed revisions to this exhibit attached to letter from Frank C. Carlucci, Associate Director of OMB, to the Rev. Theodore Hesburgh, C.S.C., Chairman, U.S. Commission on Civil Rights, Feb. 3, 1972, which is an example of an even more convoluted attempt to eliminate such confusion.

[121] For those who believe distinctions between color and race are necessary the 1960 census publications may be confusing. They refer to three major *racial* groups: "white", "Negro", and "other races" and to two *color* groups, "white" and "nonwhite." Thus, when data were displayed for whites, unless indicated, it would be unclear if these data were based upon color or race.

[122] Office of Management and Budget, Clearance Office Manual, Rev. July 1971.

[123] See P. Hauser, "On the Collection of Data Relating to Race, Religion, and National Origin", paper delivered at the Institute on the Collection and Use of Data Based on Race, Religion, or National Origin, Nov. 18, 1959; and Henry D. Sheldon, "Racial Classification in the Census". Proceedings of the Social Statistics Section of the American Statistical Association, 1962, at 254, 255.

Other groups have faced the same problems. When minority group categories have been described as "racial", as in the 1970 census, some American Indians reported confusion in self-identification. Although most consider themselves to be members of a distinct social group, they do not necessarily consider their distinguishing characteristics to be racial.[126] Parallel to this, there are persons who consider themselves to be Negro and prefer classification by race rather than by color.[127]

Both OMB and the Bureau of the Census assert that the "concept of race as used in Federal statistics is not a clearcut biological definition, but includes some categories which refer to national origin".[128] It is, therefore, not clear why either of these Agencies would disregard distinctions between race and national origin in some instances [129] and maintain them in others.[130]

The categories currently used by USDA, HEW, HUD, and DOL are based on a mixture of color, racial, national origin, and ethnic designations, and the use of such terms in a single questionnaire has been continuously approved in OMB forms clearance procedures.[131] As commonly used, these designations do not refer strictly to race, color, national, or ethnic origin, but rather to minority group membership as perceived both by the particular group and by the general public. As stated by HUD: "Racial, color, and ethnic designations are now recognized and described as minority group".[132]

Separate classifications of race, color, national origin, or ethnic group can be justified only if the data which would result from such distinctions have a legitimate use in terms of combating discrimination, planning programs, or conducting program evaluation. For example, if it could be demonstrated that there is a general need for Federal program data on white Spanish surnamed persons as distinct from black Spanish surnamed persons, that data should be collected. If no such need can be demonstrated, it is doubtful that their separate collection would serve any useful function.

In fact, no needs for data resulting from these distinctions were encountered. While statisticians have expressed the desire to separate color and/or race from ethnic or national origin group, minority groups do not express the need for such data. On the contrary, Spanish speaking groups, for example, express a great need for data on their members by country of origin, such as Puerto Rican, Cuban, or Mexican American. While persons of Spanish descent encompass all races, distinctions based on national origin rather than race are seen as the meaningful ones.[133]

To some extent the problem relates to the choice of names for minority groups, and not to the decision of which groups should be separately identified. This problem arises as a result of the erroneous belief that minority group membership can be defined by the presence of particular characteristics such as skin color or language and that the names used to describe minority groups should reflect their individual characteristics. It is the essence of prejudice to expect that all members of a group bonded together by ancestry and common experience will share any single characteristic. The problem can be solved in part by selecting generally acceptable terminology which connotes minority group membership, but not necessarily minority group characteristics, and by providing clear definitions which indicate that the terminology is not intended to describe characteristics of all group members. Instructions should state that only primary group identification, based upon self-perception, should be reported.

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[124] See, for example, HEW for OS/CR 101, "School System Report," and HUD Handbook 2160.5, 1970.

[125] United States Employment Service Program Letter No. 2238, Department of Labor, June 23, 1967.

[126] Interview with Jack D. Forbes, Professor of Native American Studies, University of California at Davis, Jan. 11, 1972.

[127] Interview with John Hope II, Assistant Director for Planning, Office for Civil Rights, and HEW staff, Department of Health, Education, and Welfare, Aug. 12, 1971.

[128] OMB Circular A-46, Exhibit K, Aug. 8, 1969; cf. *U.S. Census of the Population: 1960.* Vol. I, *Characteristics of the Population, Part I. United States Summary*, at XLI.

[129] For example, the 1970 census lists both Japanese and Chinese as separate categories under "race", although national origin and not race is the characteristic which distinguishes these groups from each other; both are members of the Mongoloid race.

[130] In the 1970 census, Spanish origin is not listed as a racial group, thus limiting the amount of data collected concerning this group.

[131] See Section III, B for a further discussion of OMB responsibility for Federal forms clearance.

[132] Department of Housing and Urban Development, Report Management Systems, *supra*, note 124.

[133] Interview with Edward W. Aponte, Executive Director, Cabinet Committee on Opportunities for the Spanish Speaking People, Feb. 18, 1971.

D. METHOD OF IDENTIFICATION

1. VISUAL OBSERVATION AND SELF-IDENTIFICATION

Self-identification, in which the individual supplies his own race or ethnic origin and visual observation, in which an observer makes a judgment about the individual's race or ethnic origin, are the two principal means of obtaining racial and ethnic data when it does not exist on records. There has been much controversy about the acceptability of each of these methods.

In some instances, visual observation is required and self-identification prohibited. The Department of Labor, for example, has issued specific requirements regarding minority group identification. It has directed that color and minority group identification be made by interviewers solely on the basis of visual observation. DOL further instructs interviewers to rely on their knowledge of characteristics common to each group for making designations. The policy is explicit that applicants to the State employment services are not to be asked their color or minority group identification.[134]

On the other hand some Agencies approve the use of self-identification. When HUD began collecting data on the race and ethnic origin of all approved mortgagors,[135] visual observation by the mortgagees [136] was used, but HUD now relies upon self-identification.[137] HUD officials believed that the change would make the data collected more comparable with census data, much of which was obtained through self-identification, so that census data could be used in evaluating HUD data.

Of the Agencies studied, HEW has issued the most flexible directive concerning data collection methods, asserting that both techniques have proved effective and allowing either in departmental data collection.[138]

Statistical staff at OMB, which, as part of its responsibility to approve forms used in Federal data collection must also assess proposed data collection techniques, have indicated belief that an adequate agencywide racial and ethnic statistical system would have to include provisions for both visual observation and self-identification.[139] The proposed revisions to OMB Circular A-46 suggest that both techniques are acceptable.

The Department of Justice, too, has indicated support of both methods, although it has favored visual observation. The Department has said: "While the method of visual survey is preferable where feasible, it would often not be a practical way to obtain data as to beneficiaries".[140]

Whether self-identification or observer identification is preferable may depend upon the purposes of the survey. For example, if the survey's purpose is to detect any racial or ethnic discrimination at the point of distribution of assistance occurring because of someone's visual impression of the race or ethnic origin of applicants, it would be important to measure the race or ethnic origin of applicants as perceived by those who are distributing assistance. On the other hand, if the purpose of a survey is to investigate a claim by a minority group that members of this group have not received an equitable share of program benefits because of institutional discrimination,[141] it might be important to measure the race and ethnic origin of beneficiaries as they perceive themselves. In addition, each method can be used to check the validity of the data collected by the other method.

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[134] United States Employment Service Program Letter No. 2238, *supra* note 119. See also Unemployment Insurance Program Letter No. 919, Department of Labor, June 23, 1967. Prohibitions on the collection of racial and ethnic data on employment by self-identification exist elsewhere in the Federal Government. The Civil Service Commission requires each Federal Agency to survey the race and national origin of its employees by visual observation; see 32 Fed. Reg. 11847 (1967). Civil Service Commission rules prohibit inquiries into the race or ethnic origin of Federal employees and applicants; 5 C.F.R. Part 4 Sec. 4.2 (1962) A bill proposed by Senator Sam Ervin (S. 1438, 92nd Cong.) would prohibit inquiries of Federal employees with regard to their race or national origin.

[135] A mortgagor is a person who puts up his property as collateral for a loan.

[136] A mortgagee is a person to whom the property is mortgaged.

[137] Interview with Laurence D. Pearl, Acting Director of Equal Opportunity for Mortgage Credit Federal Housing, and staff, Department of Housing and Urban Development, Sept. 16, 1971.

[138] Memorandum from Wilbur J. Cohen, formerly Secretary of HEW to HEW Agency Heads, "The Collection and Use of Racial and Ethnic Data." Jan. 17, 1969. Both techniques are, in fact, used by HEW. The Social Security Administration collects racial and ethnic information through self-identification. Elementary and secondary school pupil data are collected by visual observation, with strict prohibitions against making inquiries of the pupils (Form OS/CR 101 HEW School System Report, Fall 1968 Elementary and Secondary School Survey.)

[139] Interview with Milo B. Sunderhauf, Analytical Statistician, Statistical Policy Division, Office of Management and Budget, Aug. 9, 1971. See Section III, B for a further discussion of the OMB role in the collection of racial and ethnic data.

[140] Letter from David L. Rose, former Special Assistant to the Attorney General, Department of Justice, to Merwin W. Kaye, Director, Research and Operations Division, Office of the General Counsel, Department of Agriculture, Dec. 6, 1967. It might also be noted that in the area of employment, the Equal Employment Opportunity Commission encourages private employers to obtain racial and ethnic information by visual survey or other means which avoid a direct inquiry. Direct inquiry is permitted where other methods are not feasible. See 29 C.F.R. Sec. 1602.13 (1966).

A principal argument against the use of self-identification has been that it constitutes greater invasion of individual privacy than does visual identification.[142] This would apply, of course, only in situations in which self-identification could produce private information not discernible by visual observation. While it is conceded that requests for self-disclosure of race or ethnic origin may be perceived as offensive by some individuals, this is not a universal threat. When there is a legitimate need for racial and ethnic data, the method of collection most likely to produce that data accurately should be selected.[143]

To some extent, the method of identification may be determined by the relative feasibility of the two methods. Thus, for example, if applications for program benefits are made predominantly by mail, as is frequently done for Social Security cards, visual observation of applicants would be costly and less feasible than self-identification. If, on the other hand, no forms are maintained on individual beneficiaries as, for example, in the case of users of recreational facilities sponsored by the Forest Service (USDA) or civic centers funded by HUD, visual observation might be the most convenient method of identification. Nonetheless, the relative feasibility of the two methods is a minor consideration if the most feasible method does not produce the requisite data.

Census data have presented an opportunity for comparing the result of self-identification and visual observation for each of several racial and ethnic groups.[144]

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[141] Institutional discrimination occurs as a result of defects in a program, such as inequitable guidelines or eligibility requirements or absence of goals relating to minority group needs and is distinguished from discrimination which occurs as a result of the actions of a particular person.

[142] Those organizations opposed to the collection of applicant data were also organizations which opposed to the use of self-identification. See Section II, note 44. Strongly in favor of the use or self-identification is the Mexican American Legal Defense and Educational Fund, (letter from Mario G. Obledo, General Counsel, Mexican American Legal Defense and Educational Fund to Cynthia N. Graae, Federal Evaluation Division, U.S. Commission on Civil Rights, Feb. 4, 1972.

Organizations with no objections to self-identification include the National Congress of American Indians (interview with Franklin Ducheneaux, Legislative Consultant, National Congress of American Indians, Apr. 19, 1972), Americans for Indian Opportunity (interview with Mrs. Iola Hayden, Executive Director, Americans for Indian Opportunity, Apr. 19, 1972), the Southwest Council of La Raza, (interview with Henry Santiesteven, Southwest Council of La Raza, Apr. 24, 1972).

Other organizations are now reconsidering their policies with regard to racial and ethnic data collection (see, for example, letter from John A. Morsell, Assistant Executive Director, National Association for the Advancement of Colored People, to Cynthia N. Graae, Office of Federal Civil Rights Evaluation, Apr. 27, 1972; interview with David Ushio, Assistant Washington Representative, Japanese American Citizen's League, May 4, 1972.)

A more thorough discussion of the extent to which requests for racial and ethnic data may be an invasion of individual privacy is contained in Section IV B. In general, individual privacy can be protected by adequate safeguards, (see Section II F) and thus the issue of privacy is not discussed here. It should also be noted that if there is any danger of misuse of racial and ethnic data, use of visual observation does not provide any greater protection against that misuse than self-identification. Changing the method of identification does not alter the purposes of data collection, nor does it affect the uses to which the data could be put.

[143] This position is supported by Edward Brown, Director of Political Affairs, Congress for Racial Equality, who stated that while his organization had no official policy regarding the method of identification, it was his belief that data should be collected in the most pragmatic way. Interview with Edward Brown, Congress for Racial Equality, Apr. 20, 1972.

[144] Until 1960, visual observation was the only method used for the Decennial Census. In 1960, however, some households were sent census forms prior to the house to house visits made by the census takers; in these cases, the role of the census taker was not to complete the forms, as it was elsewhere, but merely to insure that the forms had been properly completed.

Census takers were instructed never to ask a respondent to reveal his or her race. If this question was unanswered, the enumerator's judgment was used in answering the question for the respondent. In 1970, in some urban areas, census questionnaires were mailed to the respondents and subsequently returned to the Bureau of the Census by mail, with no assistance from a census taker. Thus results of the De-

The Bureau of the Census reports that for Negroes there appears to be little difference between the use of the two methods. In particular, the Bureau did not detect any groups of Negroes who were not identified by either method.[145] It is more difficult to tell whether or not the use of either method might be preferable for the Asian American population. With the use of self-identification in 1960, there was an increase in both the Japanese and Chinese population counted by the Bureau of the Census. While this might be attributed to the change in the method of observation, a Census publication notes that the "high rates of national increase and substantial immigration obscure any effects which self enumeration may have had on the 1960 count".[146]

There is evidence that the use of self-enumeration provided a much more accurate count of American Indians than could be obtained by visual observation.[147] In 1950, using only visual observation, approximately 300,000 American Indians were recorded. In 1970, with widespread self-identification, preliminary figures indicated a total of almost 800,000 American Indians,[148] a change which is likely to be attributable to the change in method of observation. The Bureau of the Census reports that the lower figure for 1950 was probably due in large part to the failure of enumerators to identify off-reservation Indians [149] who may be difficult to identify by visual observation.[150] There were no comparative figures for identification of persons of Spanish descent.

While visual observation may produce fairly accurate results for some groups or for gross categories such as "minority" and "nonminority" or "white" and "nonwhite", the accuracy of a visual survey will be decreased as the number of categories are increased. Federal programs generally need more detail in data for planning and for evaluation than can be collected by visual observation. The accuracy of observer identification is limited, especially where it is necessary to make distinctions among Spanish surnamed groups, Asian American groups, or American Indian tribes.

Self-identification has been challenged as inaccurate because it is not always accepted by the public and consequently does not always produce complete or accurate results.[151] The limited evidence indicates that response to requests for self-identification has generally been high. The Social Security Administration (HEW) relies upon self-identification and reports less than a 2 percent nonresponse rate.[152] The federally insured student loan program at HEW has obtained a 95 percent response rate[153]

When individuals are reluctant to respond to a survey, it is necessary to determine whether it is the technique of self-identification or some other variable which is the cause of resistance. Respondents may object to the purposes of the survey, to an apparently mandatory nature of a request, to an apparent lack of safeguards of confidentiality, or to perceived dangers of data misuse.[154] Such objections

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cennial Census in 1950, 1960, and 1970 can be compared to determine the reliability of self-identification and visual observation for each of several racial and ethnic groups. Interview with Tobia Bressler, Chief, Ethnic Origins Statistics Branch, and staff, Bureau of the Census, Department of Commerce, July 28, 1971.

[145] *Id.*

[146] *United States Census of Population*, 1960, *supra* note 28, at XLIII.

[147] *Id.* See also Bressler interview, *supra* note 144.

[148] 1970 Population Counts by Race, announced by the Bureau of the Census, Oct. 20, 1971.

[149] Bressler interview, *supra* note 144 and U.S. Census of Population, *supra* note 128, at XLIII. The change in the number of American Indians reported may also be in part due to a change in willingness to identify as a minority group, or due to motivation to establish a basis for claims to future tribal benefits.

[150] Bressler interview, *supra* note 144. Miss Bressler also noted that in assessing the quality of data obtained through visual observation, it should be indicated that greater accuracy can be obtained when observers are representatives of the people they are to observe.

[151] The familiar example of a survey using self-identification which did not obtain accurate data was a survey conducted in the mid 1960's by the Civil Service Commission of the race and ethnic origin of Federal employees. In this survey a high proportion of Federal employees reported inaccurate racial/ethnic designations. Anthony Mondello, General Counsel, Civil Service Commission, address to representatives of the Federal Women's Program, Sept. 23, 1971.

[152] This 2 percent figure includes key punch error. Interview with Tom Staples, Special Assistant, Office of the Assistant Commissioner and Robert N. Heller, Special Assistant for Liaison with Users of Social Security Data, Social Security Administration, Department of Health, Education, and Welfare, Aug. 25, 1971.

[153] Interview with Jerald Donaway, Chief, Federally Insured Loans Branch, Division of Student Financial Aid, HEW, Jan. 22, 1971. In neither case has there been a noticeable problem of inappropriate response. Note also that there have been few objections to self-identification of race in the Decennial Census, Bressler interview, *supra* note 144.

[154] In the case of the survey of Federal employees (*supra* note 151), absence of public support had a multiplying effect. As a result of pressure from coworkers and publicized lack

might be reduced by providing full explanation of the purposes of a survey and guaranteeing to protect the identity of individuals and announcing steps to insure against data misuse. This might also increase public support for a racial and ethnic survey and provide a concomitant increase in the quality of the data reported.[155]

The conditions under which racial and ethnic designations can be made vary and may affect the quality of the data that are obtained. Self-identification and visual observation may produce different results because of the instructions provided. Visual observation, for example, may be based upon observable characteristics, such as appearance, language spoken, or reputation in the community. Visual observation may entail classification of each person on an individual basis, or it may be based on estimates of the proportion of racial and ethnic minorities participating in an activity. Self-identification may be oral or written, voluntary or compulsory, anonymous or not, but too little research has been done in this area to demonstrate the precise effects of different conditions.[156]

In the absence of adequate instructions or guidelines for data collection, it may be difficult to assess what methods were employed. For example, although the Forest Service (USDA)[157] required that forest rangers report the use of recreation facilities by the race or ethnic origin of the users, it supplied no instruction to the rangers on how this should be accomplished. As a result, it is uncertain if the figures reported represent actual head counts or only rough estimates and whether they were based upon daily records or periodic checks.[158] Similarly, the Extension Service (USDA) is unclear as to how the data submitted to it were collected.[159]

Instructions for self-identification may vary, too, and may also affect the data collected; instructions may suggest self-perception of racial or ethnic origin as the sole criteria for identification or may prescribe the use of guidelines based on appearance, community perception, or parentage. While there will undoubtedly be a high correlation among these possible methods in general, in the event of mixed parentage, the correlation among such criteria as self-perception, community perception, and appearance may be reduced.

The Bureau of the Census has issued guidelines for determining race or ethnic origin in the event of mixed parentage.[160] While not mandatory for other Federal Agencies, the guidelines have gained acceptance because the Bureau of the Census is generally regarded by program managers as the ultimate authority on statistical matters. The Bureau of the Census has directed that mixtures of *nonwhite* races should be classified according to the race of the father; and that mixtures of white and other races should be classified according to the race of the nonwhite parent.[161] Thus, for statistical purposes some offspring of Chinese American Indian marriages will be regarded as Chinese and some as American Indian, but offspring of black-white marriages will always be regarded as black. Such guidelines are reminiscent of discriminatory State laws which provided a legal

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of support from the press, resistance to this survey was increased.

[155] These measures are discussed more fully in section II, F.

[156] There are many possibilities that require research. Written responses may provide more assurance of privacy to respondents than oral responses and thus result in more accurate data; in contrast, respondents will also be aware that oral responses and responses identifying the respondent can be checked for accuracy and may be thus prompted to respond appropriately. Voluntary responses may produce a low response rate if support for the purposes of data collection is low; on the other hand voluntariness might also serve to increase support for data collection by reducing the threat of invasion of privacy.

[157] The Forest Service is responsible for promoting conservation and the optimum use of the Nation's forest lands, which cover approximately one-third of the total land of the country.

[158] Interview with Albert McDowell, Civil Rights Coodinator, Forest Service and Forest Service staff, Department of Agriculture, Aug. 3, 1971.

[159] Interview with Edwin Kirby, Administrator, and staff, Extension Service, Department of Agriculture, Aug. 12, 1971.

[160] Since these guidelines require knowledge of the race or ethnic origin of an individual's parents, they would be difficult to apply for use in identifications made by visual observation.

[161] U.S. Census of the Population: 1960, Vol. I, *Characteristics of the Population*, Part I, United States Summary, page XLII. These guidelines are also used by the National Center for Health Statistics in preparing vital statistics. See *Health Services and Mental Health Administration (HSMSA) Health Reports*, Vol. 86, No. 9, September 1971. *HSMSA* also instructs that mixtures of Negro with *any other race be coded as Negro.*

In computing birth rates by race or ethnic origin a comparison is made between the number of women of child bearing age of a particular group and the number of births into that group. If all offspring of minority-nonminority parentage were recorded as minority births, the birth rate for that minority group would be artifically inflated.

definition of "Negro" in order to maintain systems of segregation,[162] and are indicative of the extent to which discriminatory practices have permeated the Federal bureaucracy. Further, they are arbitrary and provide inconsistent treatment for minority groups. As a result, they are inadequate for use as guidelines for self-identification.[163]

Self-identification should generally be made on the basis of self-perception, and respondents should be clearly informed that this is the basis for identification. In the event of a valid reason for measuring racial or ethnic identity on some basis other than self-perception,[164] it may be necessary to use more arbitrary guidelines. In that case, however, the guidelines should be consistent for all races and ethnic groups; the particular rules invoked should not be dependent upon the particular race or ethnic origin of the parents. The reasons for the arbitrary basis of classification should be made clear to the respondents.

In measuring compliance with civil rights requirements, there is little justification for asking someone to reveal racial or ethnic information to a Federal Agency which is not common knowledge to family, friends, or community. An instruction which permits classification of a person "as viewed in the community" as well as the use of self-perception, provides protection for such persons who do not wish to reveal information which is not visually evident.

2. Record Searches

Some program officials using racial and ethnic data do not actually collect their own data, but obtain data about specific individuals or aggregated data from other program records. The review of records was recommended by the Secretary of Agriculture when he required that programs obtain racial and ethnic informaiton regarding beneficiaries and potential beneficiaries.[165]

In some instances, Federal programs look to outside sources for aggregate data. This is especially true regarding data on persons eligible to benefit from a program.[166] To obtain aggregate data on the population eligible to benefit from a Federal program, the target population first should be described, by age, sex, and/or geographical location. The Agency should determine if racial and ethnic data on this group can be obtained from another Federal Agency. For example, the target population of Social Security retirement benefits is generally described as persons who are at least 62 years of age.[167] Statistics collected by the Bureau of the Census might be used to calculate the number of persons in this age group and its racial and ethnic composition.

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[162] Legal restrictions in such areas as marriage, voting, and school attendance have been placed on American Indians as well. See M. E. Price, *Native American Law*, 1970. Detention of Japanese was required by Federal authority during the Second World War. See, for example, Hosokawa, Bill Nicei, *The Quiet Americans*, 1969. Legal restrictions, prohibitions, and segregation of other racial and ethnic groups have not been made on people as members of these groups. For example, legal prohibition against the use of foreign language in public school systems, and height requirements for employment in police departments are, in effect, discriminatory. See Arnold H. Leibowitz, English Literacy, Legal Sanction for Discrimination, 45 *Notre Dame Lawyer*, 7, (1969) and U.S. Commission on Civil Rights, *The Excluded Student*, 1972.

Alabama, for example, in 1950 maintained in its code the definition of "Negro" as any "person of mixed blood descended on the part of the father or mother from Negro ancestors, without reference to or limit of time or number of generations removed." Pauli Murray, *States' Laws on Race and Color*, at 22, 1950. This classification was used, among other purposes, to maintain "free schools for white and colored."

[163] Even more confusing is to examine definitions provided by the Bureau of the Census for specific minority groups. In the 1970 census tabulations (see "Total and Spanish Language Population, By State: [1970 preliminary]" released by the Bureau of the Census, Department of Commerce, Mar. 9, 1972 and in preliminary 1970 census totals, released by the Bureau of the Census, Department of Commerce, May 23, 1972) persons were counted as Puerto Rican if, and only if, they were either born in Puerto Rico or born in the United States or its possessions with one or both parents born in Puerto Rico.

American Indians are only counted by the Bureau of the Census if they are fullblooded American Indians, or if they are of mixed blood and are enrolled on an Indian tribal or agency roll or if they are regarded as Indians in the community. (See Department of Commerce, Bureau of the Census, U.S. Census of Population: 1960. Vol. I, *Characteristics of the Population*, Part I, *United States Summary*, at XLII.) Such definitions are frequently inconsistent with minority group membership as perceived by the minority groups themselves. Further, the inconsistency in deriving definitions is not compatible with the accurate enumeration of minority group membership.

[164] Self-perception might not provide adequate guidelines for individuals whose self-identification is with more than one racial or ethnic group.

[165] Department of Agriculture, Secretary's Memorandum 1662, Supplement No. 1, July 27, 1970.

[166] Because Federal Agencies do not routinely collect data on individuals eligible to participate in their programs, it would be a costly and time consuming process for each program to determine the identity of each potential beneficiary and then his or her racial or ethnic origin, a process well beyond the means of most programs.

The mandate of the Bureau of the Census (BOC) is to provide basic statistics about the people and the economy of the Nation to assist Congress, the Executive Branch, and the public in the development and evaluation of economic and social action programs. Despite this mandate, census data on race and ethnic origin are often not collected or tabulated in ways which would be useful to program managers. Although the USDA Office of Equal Opportunity has encouraged its Department's programs to make use of census data as a source of information about persons eligible to participate in its programs,[168] many program managers have found this a difficult task. For example, the 4-H programs sponsored by the Extension Service (USDA) serve youths from ages 9 to 19, while the BOC publishes data using the age category of 5 to 25.[169] The Rural Electrification Administration (USDA) reported that it would have difficulty adapting census data for its use, since its programs serve family units, and most relevant census data are reported on individuals.[170] The Office of Education at HEW has difficulty using BOC data because census tracts and public school districts are not coterminous.[171] Lack of comparability between census data and requisites for program data are part of a larger problem of the lack of communication between other Federal Agencies and the Bureau of the Census with regard to the data needs of particular Federal programs.[172] The BOC continuously revises its forms and the categories it uses in tabulations, and would be receptive to information regarding the needs of Federal programs. BOC itself, however, has created no mechanisms which would assist in molding its products to meet program needs.[173]

Although program officials have reported numerous difficulties with the use of BOC racial and ethnic data, the possibilities for using these data have not yet been sufficiently explored by Federal programs. Therefore, the conclusion that census data are a poor source of racial and ethnic statistics for use by Federal programs is unwarranted. Data published by the BOC are only a fraction of that which it has available. Although certain categories of age, geographical location, or income, for example, may be used in the published tabulations of census data, special tabulations can be made using other categories. The cost of special tabulations might be considerably less than that of conducting a new survey to obtain the same information.[174]

General -purpose data[175] are collected not only by the Bureau of the Census, but also by the Bureau of Labor Statistics ([illegible]), the National Center for Health Statistics ([illegible]). The National Center for Educational Statistics (HEW), the Statistical Reporting Service (USDA).[176] These Agencies all have large data banks and they store data on race and ethnic origin. They may be of use to Federal programs in their measurement of program benefit distribution to minority group persons. They may be especially important in the determination of the race and ethnic composition of the population of eligible beneficiaries, since these data are not routinely collected by most Federal programs and the cost of additional surveys may be great. Because of their knowledge of existing data and their experience in data collection techniques, these Agencies can also provide assistance in designing and conducting surveys for other Agency programs.

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[167] Full benefits are made to retired workers of 65 years or more. Other variables such as previous earnings also describe this population. Calculation of the exact number of persons legally entitled to, but not receiving Social Security benefits, would require complicated analysis.

[168] Interview with Percy R. Luney, Chief, Program Evaluation Unit, Office of Equal Opportunity, Department of Agriculture, July 27, 1971.

[169] Kirby interview *supra* note 159. Extension Service, Department of Agriculture, Aug. 12, 1971.

[170] Interview with David A. Hamil, Administrator, and staff, Rural Electrification Administration, Department of Agriculture, Aug. 13, 1971.

[171] Interview with John Hope II, Assistant Director for Planning, Office for Civil Rights, and HEW staff, Department of Health, Education, and Welfare, Aug. 12, 1971.

[172] There are interagency committees to provide information about Agency data needs to the Bureau of the Census as, for example, the Federal Council of the 1970 census which was sponsored by the Office of Management. The BOC circulates outlines of proposed publications through this Council, but the process is time consuming and the extent to which these outlines reach program managers and their staffs is not known.

[173] Interview with Tobia Bressler, Chief, Ethnic Origins Statistics Branch, and staff, Bureau of the Census, Department of Commerce, July 28, 1971.

[174] Included in the cost of special tabulations may be expenses for computer programming and computer time. The cost of a survey will likely involve survey design and data collection, as well as key punching, programming, and computer time.

[175] General purpose data are those data which are collected to increase information available in particular areas, as opposed to those data which are collected specifically for the purpose of program administration.

[176] Some of the relevant data collected by these Agencies include: Bureau of the Census: population, housing, agriculture, business, governments, and transportation; Bureau of Labor Statistics: employment, unemployment, earnings, wages, prices, and standard of living indices; National Center for Health Statistics: morbidity, health care, and vital statistics; National Center for Educational Statistics: enrollments, teachers, graduates, adult and vocational education; Statistical Reporting Service: farm employment and wage rates. See, Bureau of the Budget, *Statistical Services of the United States Government*, 1968.

Data collected in conjunction with the administration of particular programs are sometimes used as sources of general purpose data;[177] the Social Security programs (HEW)[178] and the Unemployment Compensation Program (Manpower Administration, DOL) produce data concerning population, businesses, and employment. Since such general purpose data can and should be used for program planning and evaluation, it is important that they include a separate identification of specific racial and ethnic groups.

Racial and ethnic distinctions in general purpose data are also useful for highlighting special needs and problems of particular racial and ethnic groups, as, for example, the severe problem of blindness among American Indians in New Mexico[179] or that of drug addiction among Japanese middle class youths in California.[180] Absence of racial and ethnic distinctions in general purpose data may result in failure to take these special needs into account and, consequently, in an inequitable distribution of Federal assistance.

To date, however, the collection of racial and ethnic data for research and general purposes is insufficient. The Insurance Service (VA) which supplies data for medical research purposes does not collect data on race[181] or ethnic origin. The Food and Nutrition Service (USDA) has not planned for the collection of racial data with regard to its study on the nutrition of participants in the food stamp program.[182] The result of inadequate racial and ethnic data is noted in a memorandum to former Secretary of HEW Wilbur J. Cohen:

> In the absence of other reliable data on the poor and diasdvantaged, we frequently assume that minority groups, especially Negroes, represent our problem in its most acute form.[183]

In some instances, data on the target population of a particular Federal program are collected by some other Federal program. For example, discharge (other than dishonorable) from the Armed Forces, is a requirement for participation in most Veterans Administration programs. Thus, any racial or ethnic data collected by the Armed Forces might be adopted for use by the VA in describing the population eligible for its benefits.[184]

Although interagency cooperation in data collection could minimize duplication in the collection of beneficiary and eligibility data, little cooperation occurs among Federal programs.[185] For example,

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[177] Bureau of the Budget, *Statistical Services of the United States* at 19 (1968).

[178] The Social Security Administration also designs and conducts surveys for other Federal Agencies.

[179] Interview with Bernard Kaufman, Director of Reports and Statistics, and J. Herbert Smith, M.D., Deputy for Professional Services, Department of Medicine and Surgery, Veterans Administration, Aug. 4, 1971. Interview with Marvin Drebes, Assistant Director for Standards and Evaluation, Insurance Section, Veterans Administration, Aug. 4, 1971.

[180] Interview with Toyo Biddle, Coordinator for Asian American Affairs, Department of Health, Education, and Welfare, Nov. 29, 1971. Japanese American Citizen's League, Proposal for a Cabinet Committee for Asian American Affairs, Nov. 15, 1971.

[181] Drebes interview, *supra* note 179.

[182] Interview with Arthur B. McCaw, Deputy Administrator, Food and Nutrition Service, and staff, Department of Agriculture, Aug. 4, 1971.

[183] Memorandum from Alice M. Rivlin, former Assistant Secretary for Planning and Evaluation, HEW, and Ruby G. Martin, former Director, Office for Civil Rights, HEW, to Wilbur J. Cohen, former Secretary of Health, Education, and Welfare, "Equal Opportunity Goal Setting," Nov. 18, 1968.

[184] This is not to suggest that such a solution is simple. In fact, the "separation document" used as a base for VA program participation does not contain information about race or ethnic origin. Further, the time between dates of service or separation and date of application for VA benefits is variable, complicating the use of these data. Interview with Fred Branan, Deputy Director, Research and Reports Liaison Staff, Department of Veterans Benefits, Veterans Administration, Aug. 13, 1971.

[185] Although the Office of Management and Budget has previously explored the possibilities of a central data bank for federally collected data, it has not yet studied the possibilities of such a centralized, coordinating effort in collecting racial and ethnic data to minimize duplication and maximize usefulness. Such an effort might be made possible by assigning each individual a number at birth which could be used in conjunction with Federal data collection and

HEW has current racial and ethnic data on public school enrollment.[186] These data would enable comparisons of the racial and ethnic compositions of schools which participate in school lunch and school milk programs with that of schools which do not participate in those programs. They have not been used for such an analysis. In addition, the forms used for HEW's frequent school surveys might be amended to obtain information about school participation in these programs.[187] The Food and Nutrition Service (USDA), which administers the school lunch and milk programs, has not taken advantage of HEW's school surveys to increase its knowledge about the distribution of benefits by these programs.

Programs administered through State welfare offices including those administered by the Assistance Payments Administration (HEW),[188] the Food and Nutrition Service (USDA), and the Manpower Administration (DOL) might also benefit from the sharing of data. Data on beneficiaries of the Social and Rehabilitation Service Programs are, in fact, shared with the Department of Labor.[189]

In general, however, the Department of Agriculture does not participate in sharing of data on welfare programs. The Assistance Payments Administration maintains untabulated data on the race and ethnic origin of participants in the food stamp program. Apparently unaware of this information, the Department of Agriculture plans to conduct its own survey on participation in the food stamp program.[190]

In addition to specific data on race or ethnic origin, other records sometimes exist which can be used to draw inferences about race and ethnic origin. While this information tends to be less accurate than data obtained through observation or inquiry, it can be used to determine the *probability* of race or ethnic origin and may be accurate enough for preliminary estimates.

The most widely publicized technique of record searching has been that of reviewing records of last names to estimate membership in Spanish origin groups.[191] This is not an accurate method of determining minority group membership as Spanish surnames are common not only to Spanish origin groups but also to Filipinos.[192] In addition, especially because of marriages between groups, many persons have Spanish surnames who are not of Spanish origin, and many persons are of Spanish origin who do not bear Spanish surnames. No data were available on the extent to which minority group classification made on the basis of surname is correlated with identification made by self-designation or visual observation. Despite its inadequacies, use of this technique may require no additional data collection and becomes a relatively inexpensive method to use.[193] While it would not be recommended for major decisions concerning the distribution of program assistance, it could be used for a preliminary assessment of a situation.[194] For example, especially in an area in which a significant proportion of the residents were members of Spanish origin groups,

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would eliminate need for repeated requests to individuals for racial and ethnic information.

[186] These data include school enrollment figures for schools housing more than 95 percent of the public school pupils in the Nation. (The remaining pupils were not included in HEW's sample of school systems.)

[187] The Food and Nutrition Service does not know which schools participate in its programs. McCaw interview, *supra* note 182.

[188] The Assistance Payments Administration provides money to States for such programs as Aid to Families with Dependent Children, payments for daily living costs to families with children lacking parental support; Aid to the Blind, payments for daily living costs to needy blind persons over 65; and Aid to the Permanently and Totally Disabled payments to needy disabled persons. Data are collected for the Social and Rehabilitation Service by the National Center for Social Statistics (HEW).

[189] Interview with Betty Burnside, Chief, Assistance Payments Section, National Center for School Statistics, Department of Health, Education, and Welfare, Aug. 25, 1971. McCaw interview, *supra* note 182.

The food stamp program is administered by the Food and Nutrition Service (USDA) through local welfare offices. Data are also collected in value of the stamps and the amount paid for them.

[190] McCaw interview, *supra* note 182.

[191] In 1950 the Bureau of the Census first published data on the characteristics of Spanish surnamed population in Arizona, California, Colorado, New Mexico, and Texas. These data were obtained by comparing the surnames of census respondents in these States with a list of more than 8,000 surnames known to be of Spanish origin and tabulating information from the census forms for those whose names appeared on the list of Spanish surnames.

[192] Some surnames, identified as Spanish such as Leon or Falcon, may be common to other racial and ethnic groups.

[193] Expenses involved would depend upon the size of names and whether identification was made manually or by computer.

[194] Results of a surnames count might be useful in planning a more detailed study.

total absence of Spanish surnames from a list of advisory committee members for a Federal program would be indicative of need for affirmative action to increase participation by Spanish origin persons. Although surname counts for Spanish origin groups have been given wide publicity, they may also be conducted with some accuracy for other groups such as Japanese and Chinese.[195]

Zip codes are commonly used symbols which might be used to estimate racial or ethnic identification. The Bureau of the Census has information on the racial and ethnic composition of zip code areas. Thus, given zip codes of a group of individuals, an estimate can be made of the racial and ethnic composition of the group.[196] Such estimates would not, however, be suitable for use regarding particular individuals.

Where there is by law or in practice a prohibition on releasing information with regard to particular individuals, such as those enforced by the Social Security Administration (HEW) or the Health Services and Mental Health Administration (HEW)[197], any racial and ethnic data regarding individuals could not be shared. Nevertheless, aggregate data on a particular group of individuals may still be obtained. The Social Security Administration, for example, has used a system which enables it to provide data with regard to a *group* of individuals which could not be released in connection with *particular* individuals. If a Federal Agency wishes to determine the racial or ethnic composition of a group of participants, it can supply their numbers to the Social Security Administration. The Social Security Administration then determines the total number of minority participants[198] in this group and supplies the aggregated data to the program requesting the information.[199] The primary restriction is that the list of individuals supplied to the Social Security Administration be large enough to protect the identity of the individuals involved.[200]

E. FREQUENCY OF COLLECTION AND DETAIL REQUIRED

1. FREQUENCY

An effective racial and ethnic data collection system must specify how frequently the data are to be collected or how current they must be. Nonetheless, *no Agencies* studied have issued instructions specifying the frequency of data collection and, in the absence of such instructions, some programs appear to be operating with obsolete beneficiary and eligible beneficiary data. For example, some of the racial and ethnic data reported by the Social and Rehabilitation Service (HEW) on assistance provided to the blind and to the permanently and totally disabled[201] are almost 10 years old, despite at least 100 percent increase in participation during this time.[202] Some of the data reported by the Agricultural Stabilization and Conservation Service (USDA)[203] and the Forest Service (USDA) were 3 years old at the time they were included in a departmental publication on the beneficiaries of USDA's programs.[204] In 1971, the Farmers Home

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[195] Biddle interview, *supra* note 180.

[196] The use of two or more variables such as surnames and zip codes to make such estimates would increase their accuracy. The Forest Service (USDA) plans to make use of zip codes to review park use. Interview with Albert McDowell, Civil Rights Coordinator, Forest Service, and Forest Service staff, Department of Agriculture, Aug. 3, 1971.

[197] Interview with Tom Staples, Special Assistant, Office of the Assistant Commissioner, and Robert N. Heller, Special Assistant for Liaison with Users of Social Security Data, Social Security Administration, Department of Health, Education, and Welfare, Aug. 25, 1971 and Section 305 of the Public Health Service Act.

[198] Currently the Social Security Administration collects data for whites, blacks, and others.

[199] Staples interview, *supra* note 197. This information is available for more than 98 percent of current applications for Social Security cards. Nonresponses, keypunch, and other errors account for fewer than 2 percent of all cases.

[200] A major Federal user of Social Security data is the Manpower Administration (DOL) in its studies of earnings before and after training. In addition to race or ethnic origin, other statistics which can be obtained by this method are age and sex. Social Security Administration files also contain data on the earnings of individuals. Retrieval of this information is possible but more complex.

[201] Through State welfare offices, HEW provides monetary assistance to the blind and to the permanently and totally disabled in meeting daily living expenses.

[202] Interview with Frank Hanmer, Budget Officer, Assistance Payments Administration, Social and Rehabilitation Service, Department of Health, Education, and Welfare, Aug. 23, 1971.

[203] The Agricultural Stabilization and Conservation Service (USDA) is responsible for administration of programs of price support, production adjustment (both marketing quotas and incentive payments), disaster relief, and conservation assistance.

[204] If the Department of Agriculture had required an increase of assistance to minorities in some of these programs, the data would be obsolete. This is illustrated by data presented for the Cooperative Forest Management Program which provides technical assistance to private landowners for development of forest resources. More than 10 percent of all

Administration was still calculating the nonwhite rural population from 1960 census data.[205] While it is obvious that it is unacceptable to use data of the vintage reported in these examples, there can be no automatic prescription for the frequency with which these data ought to be collected.

Recommended frequency[206] will depend upon such factors as the method of data collection, the expected rates of change in program participation, and the goals and timetables set for minority group participation. Frequency of data collection and tabulation should be adjusted to the frequency of turnover in program participation. The greater the change in program participation, the more frequently data should be collected and/or tabulated. Participant data will rapidly become obsolete if they have not been brought up to date following program changes affecting participation such as use of new recruitment techniques, expanded publicity concerning program participation, increased funding for program participation, or changes in the community which may affect participation such as in outmigration from and relocation within the community. Seasonal fluctuations in program participation should also be measured by race and ethnic origin.[207]

Although the racial and ethnic composition of the group of persons participating in a particular program may have been constant from year to year if this composition has represented inequities in program distribution, data collection must be frequent until the inequities have been eliminated. The frequency of data collection will thus depend upon the program goals and the timetables for those goals. In all cases, where numerical goals have been set, data should be required to determine the extent to which those deadlines have been met. Frequent data collection may serve not only to provide information to program managers about the distribution of program benefits but also to require the recipients of Federal assistance to receive current information concerning the extent to which they are distributing program benefits to minority beneficiaries.

2. DETAIL REQUIRED

Another important question in establishing a system of racial and ethnic data collection and use is how much detail should be required in the data available to program managers. It is important to determine whether data aggregated at the State level are sufficient, if program managers need access to data summarizing the activity of particular recipients, or if the program office should store data on each program beneficiary.

Programs of direct assistance, such as those administered by the Social Security Administration (HEW) and the Veterans Administration generally have access to data on individual beneficiaries.[208] Programs administered through recipients, however, tend to receive only aggregated data from these sources. Where States are the recipients of Federal funds they may provide summary data for each of their organizational units, such as counties or school districts, or they may provide data to the program office aggregated at the State level.[209]

The extent of detail sufficient for the program office depends on the purposes of the collection. When data are collected to measure the degree of equitable distribution of program benefits to minorities, this inquiry must extend to the local level and to all recipient activities.[210] Data aggre-

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farm owners are minority group members, and about 40 percent of the land owned by blacks in the Southeastern United States is forest. Nonetheless, in 1968 and again in 1969, less than 1 percent of the participants in the Cooperative Forest Management Program was minority. Because no data were reported for 1970 and 1971, any efforts to increase minority participation cannot be evaluated. See, Department of Agriculture, *Participation in USDA Programs by Ethnic Groups*, 1971.

[205] *Id.*

[206] When data are collected by questionnaire or by head count, it is necessary to determine how frequently such measures will be taken. When data are collected on application forms or any other continuously maintained records, it is necessary to consider the frequency with which the data from these records will be tabulated to supply information about the total number of applicants or beneficiaries within a given time period.

[207] School enrollment and attendance and employment are examples of activities with seasonal fluctuations.

[208] Staples interview, *supra* note 197. Interview with Bernard Kaufman, Director of Reports and Statistics, and J. Herbert Smith, M.D., Deputy for Professional Services, Department of Medicine and Surgery, Veterans Administration, Aug. 4, 1971.

[209] The Extension Service (USDA), for example, has access only to State totals for the data collected. Kirby interview, *supra* note 169. In the Extension Service (USDA) it would be necessary for the program office to review aggregate data for each type of activity written in a county such as homemaker services, farm management, and family living. If two or more organizational units, such as 4-H Clubs, exist within a county, summary data for these units, too, are necessary.

[210] To carry out their responsibilities for informing themselves on the impact of their programs upon minority bene-

gated at the State level will provide no information about the geographic location of any inequities which are uncovered through examination of the aggregated data. Indeed, data aggregated at the State level may obscure any inequities which are occurring in isolated localities.

Data on individual beneficiaries may also be necessary for the program office when it wishes to investigate a particular recipient, whether as part of a complaint investigation or part of a compliance review. But forwarding all beneficiary data to the Washington office would rapidly prove unmanageable, except with automatic data processing.[211] Unless there is valid reason for doing otherwise, data on individuals which are not forwarded to the program office should be retained by the recipient or local program office for possible further review.

F. SAFEGUARDS IN DATA COLLECTION

1. THE NEED FOR SAFEGUARDS

In most aspects of American life, including employment, education, housing, and political participation, both tradition and law have served to deny opportunities to many Americans because of their race or ethnic origin.[212] Intentional discrimination has been accomplished through a variety of means, including personal knowledge of a person's minority group membership, records containing racial or ethnic origin information, and forthright collection of statistics which have been collected for the purposes of providing differential treatment.[213]

Historically, discriminatory racial and ethnic distinctions have been perpetuated by the Federal Government. Federal assistance has been provided to segregated schools, housing projects, hospitals, and organizations. Racial and ethnic designations used on application forms for the distribution of Federal assistance have been used to maintain this segregation.[214] With the passage of civil rights legislation and Executive orders designed to end discrimination by the Federal Government came the reasoning that elimination of racial and ethnic designations on Federal forms would reduce discrimination. As a result, many efforts have been made by private, State, and Federal agencies to remove such designations from forms.[215] Private organizations interested in protecting the rights of minority group citizens have gone on record as opposing the inclusion of racial and ethnic information on application forms.[216]

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ficiaries the Food and Nutrition Service (USDA) needs to have access to participation in the school lunch program for each individual school.

[211] Storage space for files on individual beneficiaries in a program serving several million persons would take 100 or more filing cabinets.

[212] See, for example, T. Gilbert, *Race Distinction in American Law*, 1910; P. Murray, *States' Laws on Race and Color*, 1951; M. E. Price, *Native American Indian Law*, 1970; F. Cohen, *Federal Indian Law*, 1943; Bill Hosokawa, *Nisei, The Quiet Americans*, 1969; G. Salinas, "Mexican Americans and the Desegregation of Schools in the Southwest," Houston Law Review 8:929-951; New England Regional Council, *Overview of the Problems Encountered by New England's Spanish Speaking Population*, July 7, 1970.

[213] Collection of racial and ethnic information for use in making decisions about the treatment of minority applicants is alleged to have occurred as recently as 1967. One company, which performed investigations for insurance companies for use in determining whether or not insurance coverage should be granted, included in its investigators' manual instructions for obtaining information on whether the person was Caucasian or a mixture of races; whether Mexican Americans investigated were permanent residents or "floater types", whether Mexican Americans associated with other Mexican Americans, and whether they lived in "hovel type" residences. See Standard N. Sesser, "Big Brother Keeps Tabs on Insurance Buyers," *New Republic*, Apr. 27, 1968, introduced at the Hearing before a Subcommittee of the Committee on Government Operations, House of Representatives, 90th Cong., 2nd Sess., May 16, 1968 at 53, 54.

[214] In 1914 the Civil Service Commission required that photographs be attached to applications for Federal employment. This resulted in strengthening discrimination against blacks in the Federal civil service; Samuel Krislov, *The Negro in Federal Employment: The Quest for Equal Opportunity* at 21, 1967. See also, for example, A. Mindlin, "The Designation of Race or Color on Forms," *Pub. Ad. Rev.*, Vol. XXVI No. 2 at 110, June 1966.

[215] Mindlin refers to this trend as a "prime objective of the civil rights movement" in the past. Because few records are accessible on the effects of the trend to remove racial and ethnic designations from Federal forms, the exact dates this occurred within the Federal Government are difficult to determine. (See Sandra R. Clark, unpublished paper, "Public Pressure and Public Policy: A Case in Civil Rights," Dec. 8, 1971.) The time of this "purge" of questions of race and ethnic origin from Federal forms is placed by Thomas McFee, Deputy Assistant Secretary for Program Systems, HEW, as the late 1950's and early 1960's, (memorandum from Thomas McFee to HEW Program, Planning, and Evaluation staff, "Collection of Racial/Ethnic Data," Sept. 14, 1970.) The Bureau of the Census places it as beginning after 1930. (Henry D. Sheldon, "Racial Classification in the Census," *Proceedings of the Social Statistics Section*, 1962, Am. Stat. Ass'n. at 254.)

[216] American Civil Liberties Union, Policy Statement, "Collection and Dissemination of Racial and Religious Information," Jan. 13, 1968. National Urban League, Resolution,

State prohibitions on the use of racial and ethnic data in real estate transactions have been included in some Fair Housing legislation.[217] Similar prohibitions on the collection of racial and ethnic data on applicants for employment have been included in Fair Employment legislation.[218] Questions about race or ethnic origin were also removed from the forms used in the process of distributing Federal assistance.[219]

The argument that racial and ethnic data may be used for discriminatory purposes continues to be raised in opposition against their collection.[220] If information about race or ethnic origin is included on an application blank and is available to those who will decide the fate of that applicant, the racial or ethnic information might be used to reject the application. For example, information about a prospective mortgagee's race or ethnic origin might be the determining factor in the decision concerning approval or disapproval of an application for a federally insured mortgage loan. Racial or ethnic classifications might be used in finding housing for persons being relocated because of federally assisted construction, with attempts made to match the race or ethnic origin of the person being relocated with particular neighborhoods. Racial or ethnic designations might be used in making job referrals or assigning job classifications [221] for applicants to State employment agencies.

Concealing information about race or ethnic origin until after the acceptance of an applicant may not provide sufficient protection. This information may still influence subsequent treatment; for example, knowledge of a person's race or ethnic origin might influence the leniency with which a bank will tolerate late payments. Even in instances in which racial or ethnic data are not used for calculated or systematic discrimination, they may be introduced inadvertently or unconsciously in the decisionmaking process. Again, while a loan committee or insurance office may not be intent upon discriminating against a particular racial or ethnic group, its knowledge of a person's minority group membership could have an influence on the estimate it makes of credit risk[222]

When racial and ethnic data are collected for legitimate purposes, another potential problem is the possible release of these data to unauthorized individuals or their release for unauthorized purposes.

There are individuals who genuinely object to re-

"Racial Breakdowns in Statistical Information Collected by Public Agencies," Sept. 5, 1962. While both of these statements are supportive of racial and ethnic data collection, they advocate that racial identification should not be placed upon records which may be used for decisions concerning an individual. Nondisclosure at the point of application is also the policy of the Fellowship Commission, a nonprofit consortium of Pennsylvania agencies devoted to securing equal rights for racial and ethnic groups. This policy was established following a 1959 conference on the collection of racial and ethnic data attended by representatives of about 90 private and public agencies, organizations and businesses. Interview with Maurice B. Fagan, Executive Director, Fellowship Commission, Jan. 28, 1971. See also Section II note 44.

[217] See, for example, Mass. Gen. Laws, Ch. 151B, Sec. 6, 7 and 8; Mich. Comp. Laws, Ann., Sec. 564.201(g), and N.Y. Exec. Law, Ch. 188, Sec. 296 (3c).

[218] E.g., see, N.J. Stat. Ann. Ch. 5, Sec. 10:5-12 (c), N.H. Rev. Stat. Ann., Ch. 354-A, Sec. 8 (III); N.Y. Exec. Law, Ch. 118, Sec. 286, 1 (d), and 43 Penn. Ann., Ch. 17, Sec. 955 (1). Some of these were enacted as recently as 1970 (e.g., Pennsylvania.). Although such laws are still in effect, with the exception of New Hampshire, Federal requests for racial and ethnic data have been honored by States with statutes which are originally interpreted as conflicting with those requests.

[219] Among the Agencies eliminating questions about race or ethnic origin from their forms were the Veterans Administration, the Department of Agriculture, and the Department of Labor. Racial and ethnic designations were also removed from forms used by the Health Services and Mental Health Administration (HEW). Interview with J. T. Taaffe, Director, Compensation, Pension, and Education Service, and staff, Veterans Administration, Aug. 13, 1971; Kaufman and Smith interview, *supra* note 208; interview with Arthur B. McCaw, Deputy Administrator, and staff, Food and Nutrition Service, USDA, Aug. 4, 1971; interview with Stanley Glaser, Reports Clearance Officer, Health Services and Mental Health Administration, HEW Aug. 27, 1971; Department of Labor Leaflet, "A New Step Toward Equal Opportunity" (GPO 912-416) undated.

[220] For example, the staff members in the Forest Service (USDA) argue that the collection of racial and ethnic data again opens a possibility of discrimination which had been eliminated earlier. Interview with Albert McDowell, Civil Rights Coordinator, Forest Service, and staff, Department of Agriculture, Aug. 3, 1971. Staff members of the Department of Medicine and Surgery at the Veterans Administration are reluctant to collect racial and ethnic information for civil rights purposes because "there is always someone who thinks you have an ulterior motive" for collecting such data. Kaufman and Smith, interview, *supra* note 208.

[221] Applicants to State Employment Agencies are theoretically assigned job classifications on the basis of experience and ability.

[222] There is ample evidence that factors relating to race have been considered by insurance companies as relevant in decisions providing coverage to individuals and organizations. See Sesser, *supra* note 213.

vealing their race or ethnic origin to anyone[223] and who, by reasons of appearance, are not obviously recognized as belonging to the particular racial or ethnic group with which they identify. They may consider this information to be personal and may, in fact, have withheld it even from close friends. They may particularly object to answering inquiries concerning their race or ethnic origin because of the possibility that their responses might be made public.[224]

There may be a danger that data assembled for statistical purposes will be made available to someone who is intent upon making discriminatory classifications. Such misuse could occur, for example, if racial and ethnic data collected by a local housing authority were made available for use by the individuals responsible for informing selected applicants about available housing.[225] Misuse might also occur if data are released outside the Agency; for example, if data collected by State employment agencies on the race or ethnic origin of applicants for employment were released outside the State agencies,[226] an employer who wished to screen out minority applicants might gain access to this information for discriminatory purposes.[227]

2. DATA COLLECTION SAFEGUARDS

Objections to collection of racial and ethnic data by persons who perceive this to be an invasion of privacy or fear misuse of this information in their individual cases cannot be dismissed lightly. Such objections emphasize the responsibility of Agencies to insure against misuse of racial and ethnic data and to develop collection methods that do not violate legal rights to privacy. These objections may result in interference with the quality of the data collected since persons who object to racial and ethnic data collection may give incomplete or inaccurate answers to questions about racial or ethnic origin. These objections are related not only to the subject of inquiries of race and ethnic origin, but also to the method of inquiry and the subsequent absence of safeguards against the misuse of this information. Thus, in many instances it is not necessary to eliminate racial and ethnic data collection to reduce these objections. There are safeguards which can provide protection for persons who might otherwise be troubled by providing such information.

The most complete protection against the misuse of any data would be the total absence of their collection. Although there may be a danger that racial and ethnic data will be used for discriminatory purposes, the elimination of racial and ethnic designations would not provide an effective weapon for reducing racial and ethnic discrimination.

In the absence of such designations, other information is generally available which can be used to make discriminatory racial and ethnic distinctions. In many instances, color, race, or national origin can be determined by observation; thus when there is personal contact with an applicant beneficiary, or potential beneficiary, a prohibition against the notation of racial or ethnic designations on forms does not eliminate knowledge of an individual's race or ethnic origin.[228] In addition, even when an applicant or beneficiary does not appear in person, his surname, address, school or college, or organizational affiliation may provide a significant indication of his racial or ethnic origin.[229] For example, knowledge that a person attended Tuskegee Institute or the University of Maine, provides certain information regarding the *probability* that an individual is or is not a member of a minority group.[230] Street addresses in localities with concentration of minority persons would also indicate a strong probability of minority group membership. Professional affiliations, such as membership in the National Medical Association, the Association of Mexican American Educators and affiliations with other organizations such as the Japanese American Citizens League, the Native American Legal Rights Fund, or the Elks, may also provide clues of minority group identification.[231] Removal of all such indirect indicators of race or ethnic origin from applications and similar forms would be impossible. Thus, elimination of actual racial or ethnic designations would not eliminate all clues to race or ethnic origin.

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[223] See Section IV B for a discussion of the invasion of privacy which may result from inquiries about race and ethnic origin.

[224] Further, these objections are intensified by pressure to respond to questions about race or ethnic origin. Response to questions about race or ethnic origin may be required by law or perceived as being required by law. Penalties for perjury may apply to false responses.

[225] The Housing Assistance Administration (HUD) requires that public housing be made available on a first-come-first-served basis. Local housing authorities may establish either a plan in which the applicant must accept the vacancy offered or a plan in which the applicant must accept one of up to three vacancies offered, or revert to the bottom of the waiting list. HUD, *Low-Rent Housing Manual*, Sec. 102.1, exh. 2, "Requirements for Administration of Low Rent Housing Programs Under Title VI of the Civil Rights Act of 1964", July 1967.

[226] The Manpower Administration is the largest collector of data on applicants for employment. Records on participation in programs sponsored by the Manpower Administration include applications for employment made at the State employment security agencies (United States Employment Service), applications for unemployment compensation, and applications for a variety of training programs (including the Job Cops, the Work Incentive Program, and the Concentrated Employment Program).

[227] Another example of how such misuse can occur is illustrated by the sharing of racial and ethnic data by the New York State Motor Vehicle Bureau, which collected racial data for identification purposes in connection with drivers' licenses. This was done in conjunction with the New York State Employment Service, which at that time was prohibited from collecting this information from applicants. Warren M. Banner, National Urban League, "Statistics on Color or Race," *Proceedings of the Social Statistics Section*, 1962, Am. Stat. Ass'n. at 251.

[228] For some minority groups, especially blacks, minority group identification can often be made visually. See Section II, D. 1 for a discussion of the accuracy of visual identification.

Although there may be no provisions for collecting racial or ethnic statistics on a particular application form, this does not insure that an interviewer will not record observable racial or ethnic information. Those determined to discriminate may devise their own codes for racial or ethnic origin for use when racial and ethnic data collection are prohibited.[232]

The removal of racial and ethnic designations could only effectively limit discriminatory decisions concerning individuals: for example, decisions about whether or not to extend assistance, make grants or loans, or offer or terminate employment. Much of the discrimination which occurs in the distribution of Federal assistance, however, is not related to such decisions. For instance, eligibility requirements may be discriminatory.[233] Discrimination may occur as a result of the information which is provided or not provided about a program.[234] It may occur as a result of failure to provide services with adequate appeal or relevance to minority group citizens, or as a result of benefits which are provided in such a way that they are not accessible to minorities.[235]

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[229] For a further discussion, see Philip M. Hauser, President, American Statistical Association "On the Collection of Data Relating to Race, Religion, and National Origin," from "The President's Column," *The Ameri Stat'n.*, April 1962, at 1, 22-24.

[230] In 1970 approximately 97 of every 100 undergraduate students at Tuskegee Institute were black; in the same year approximately 98 of every 100 undergraduate students at the main campus (Orono) of the University of Maine were not classified as minority students. Unpublished statistics compiled by the Office of Civil Rights, Department of Health, Education, and Welfare, 1972.

[231] Surname, place of residence, school attendance, and organizational affiliation cannot be taken as highly accurate indicators of race or ethnic origin. Nonetheless, they are variables which may be used to make racial or ethnic distinctions and are as open to use for discriminatory purposes as are racial or ethnic data. Use of such variables for scientific estimates may be acceptable when more reliable data are not available and if clear indication is provided that the resulting data are based on certain probability estimates and not actual counts. Estimates based on these variables become less effective as indicators as colleges, organizations, and geographic areas are increasingly integrated. For a further discussion of identification of race or national origin through surname counts, see Section II D. 2.

[232] E.g., several years ago, an employment interviewer for the New York State Employment Service, which then prohibited the recording of race on applicant files, devised a "dot" system for the race of applicants. Dotted applicants, who were invariably black, were sent only to certain job interviews, undotted applicants to others. The duplicity was uncovered only when the interviewer explained the system to a replacement interviewer, who brought the code to the attention of her supervisor. See New York World Telegram and Sun, Mar. 17, 1959. Such practices continued to be common in State employment services. Among the discriminatory practices revealed in a 1968 Manpower Administration report were notations on applications to State employment services which were indicative of race, including comments on hair length, hair color, and skin color. U.S. Department of Labor, *Equality of Opportunity in Manpower Programs*, 1968.

[233] For a discussion of discriminatory eligibility requirements, see Section III A. 1.

[234] Information about Federal programs may not be publicized so that it reaches minorities. E.g., information about public hearings on Federal Highway Administration funded construction has been published only in the legal sections of major newspapers. Information provided may be only in English and thus not accessible to minorities who do not speak English. (Interview with Jack D. Forbes, Professor of Native American Studies, University of California at Davis, Jan. 11, 1972; interview with Toyo Biddle, Coordinator for Asian American Affairs, Department of Health, Education, and Welfare, Nov. 29, 1971; Massachusetts State Advisory Committee to the U.S. Commission on Civil Rights, *Issues of Concern to Puerto Ricans in Boston and Springfield*, February 1972.) Information provided may indicate that benefits are offered on a segregated basis. E.g., in 1970, the publications used by the State of Virginia to advertise its State parks included photographs clearly depicting which parks were for whites and which for blacks. (U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort*, at 17, 1971.)

[235] Museums and parks may be infrequently used by minority citizens when exhibits and historical sites have

In summary, the roots of discrimination lie much deeper than the misuse of racial and ethnic information and the absence of racial and ethnic information provides little guarantee against the widespread inequities which occur in the distribution of Federal assistance. Determinations of where and to what extent discrimination is occurring, and analyses of the practices which permit and even exacerbate this injustice must be made before corrective actions can be taken to reduce discrimination effectively. Without the use of racial and ethnic data, however, these steps can never be taken on a systematic and governmentwide basis.

Three Federal Agencies studied, which have policies regarding racial and ethnic data collection, have included provisions to prevent the misuse of racial and ethnic data. The Department of Labor has issued an order prohibiting the use of racial and ethnic data for the purposes of discrimination and has issued instructions to State agencies for implementation of this policy.[236] The Department of Agriculture has directed that racial and ethnic data "be maintained under safeguards" to prevent their misuse.[237] The Department of Health, Education, and Welfare has also indicated a policy in establishing safeguards for the protection of individual rights and against the misuse of racial and ethnic data.[238] DOL and HEW, however, have issued no guidelines for the development of safeguards to prevent the misuse of these data.

In its forms-clearance procedures,[239] the Office of Management and Budget has directed the use of safeguards in the collection of racial and ethnic data. It has instructed forms clearance reviewers to question Agencies submitting questionnaires that include items on race or ethnic origin about the intended use of that information. Although not specifically directed in regard to racial and ethnic data collection, OMB recommends that when sensitive information is to be collected, the Agency employ the safeguards of informed consent by the respondent and either anonymity or assurance of confidentiality.[240]

It is more difficult to sustain an objection to the collection of racial and ethnic data on the grounds that it is an invasion of privacy if the persons requested to supply their racial or ethnic identities are not required to give this information.[241] If individuals can freely choose whether or not to answer a question about their group affiliation they can no longer object to the personal nature of the request;[242] any remaining objections to the question must therefore be based only upon the potential misuse of the data.

To insure that a response is entirely voluntary, no adverse consequences or penalties should be attached to the person's nonresponse. First there must be no legal requirements to supply information.[243]

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little relation to minority heritage or present erroneous pictures of that heritage (Forbes interview, Id.) Offices for the distribution of Federal assistance may be located in areas that are difficult for minorities to reach. Office hours may be inconvenient and extensive waiting may be required to obtain assistance. Programs may not be explained in the language familiar to the minority community, as was reported in the Boston area in the Concentrated Employment Program (Manpower Administration, Department of Labor) by the Massachusetts State Advisory Committee Report to this Commission. *Id.*

[236] Manpower Administration Order 10-66, Department of Labor, Aug. 19, 1966. This order directs each State employment agency to prescribe that racial and ethnic information shall not be used for the purposes of discrimination. DOL Unemployment Insurance Program Letter, No. 919, June 23, 1967, directs that minority group identification should not be recorded in the "Notice to Last Employer." The United States Employment Service Program Letter No. 2238, June 23, 1967 instructs that minority group membership should be stored in code on the application form.

[237] Secretary's memorandum 1662, Supplement No. 1, Department of Agriculture, July 27, 1970.

[238] Memorandum from Wilbur J. Cohen, Secretary of Health, Education, and Welfare, to HEW Agency head, "The Collection and Use of Racial or Ethnic Data," Jan. 17, 1969.

[239] OMB approval is required for all questionnaires and administrative forms including applications and claim forms used in Federal programs. See Section III B for a further discussion of OMB forms clearance.

[240] Office of Management and Budget, *Clearance Office Manual*, Chapter V, Sections 51 and 53, Rev. July 1971.

[241] This safeguard applies only when racial and ethnic information is obtained through self-identification as it relates only to the use of information which individuals consider private and do not wish to reveal.

[242] Office of Management and Budget, *Clearance Office Manual*, Chapter Sec. 51, Rev. July 1971. "If an individual is given all relevant information . . . and is completely free to participate or not, invasion of privacy is no longer a problem."

[243] There are few Federal forms that require mandatory completion, and where completion is compulsory it is clearly so marked. The most notable of such forms are those used in connection with the Decennial Census. Pipe, "Privacy: Establishing Restrictions on Government Inquiry" 18516 *Amer. U.L. Rev.* (1969). Whether or not the request for racial and ethnic information should be accom-

Secondly, supplying racial and ethnic information should not be made a requisite for receipt of assistance by an individual, and the Federal Government should prohibit such requirements by its recipients.[244] Third, nonrespondents should not be subjected to repeated encouragement to supply the information as such encouragement may be viewed by the nonrespondents as harassment. Without this information, the request may be viewed as mandatory and may encounter objection on those grounds. If full information about the purposes of the requested data is supplied with the initial request, additional requests are not likely to add to an individual's understanding of those purposes or alter his objections to supplying the information.

Although a voluntary basis for response to inquiries concerning race or ethnic origin might reduce response rates, there are several actions which can be taken to increase responses under voluntary conditions. First, information can be given to the respondents about the purposes of the survey and about any guarantees of confidentiality which are offered. This should decrease any objections to supplying this information. Second, respondents can be given a choice of supplying their racial or ethnic origin as they perceive it or as it is perceived in the community.[245] This eliminates the requirement for supplying information which is viewed as confidential. Third, where individuals decide not to supply their race or ethnic origin, this information may be supplemented, where feasible, by identification based upon visual observation or other available information. Even where visual observation would not be a reasonable solution as, for example, when racial and ethnic information is solicited by mail, probability estimates of the racial and ethnic composition of the nonrespondent population might be made by visual survey on a sample basis or by the use of surnames, addresses, or other identifying information.

The strongest assurance that racial and ethnic designations will be retained in confidence is to insure that there is no link between them and other identifying information such as name or Social Security number. This is most effectively accomplished

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panied by a statement of the voluntary nature of the response should also be considered. Currently there is no Federal requirement which makes it mandatory for Federal Agencies to indicate the optional nature of the questions on their forms; and thus the optional nature of providing information requested by the Federal Government is not widely known.

[244] A complaint received by this Commission indicated that at least one beneficiary of a Federal program was denied a right to a fair hearing for failure to provide information regarding race.

The Social Security Act, 42 U.S.C. § 602, states that basic rights of persons receiving and applying for aid are to object to a decision of the welfare department (such as denial of or reduction in aid) and to be given a Fair Hearing in review of that decision. In a complaint to the U.S. Commission on Civil Rights it was alleged that this right was denied for failure to provide information about race requested on an application used for a Fair Hearing. This item was added to the Fair Hearing application because of a request by the Department of Health, Education, and Welfare for racial and ethnic data from State agencies. While HEW did not instruct State agencies to obtain these data by mandatory requests from applicants, it has, however, supplied no instruction for obtaining these data which would indicate that this practice is prohibited by HEW. (See letter from Jeffrey Starkweather, Staff Advisor for Equal Employment Opportunity and Civil Rights, Social and Rehabilitation Service, Department of Health, Education, and Welfare, to Jeffrey M. Miller, Chief, Federal Evaluation Division, U.S. Commission on Civil Rights, Jan. 10, 1972). A local welfare office, therefore, obtained this information by self-identification. Since it was required to submit the information to the Federal Government, it apparently made the self-designation of race or ethnic origin a mandatory reporting requirement for beneficiaries.

Applicants for a marriage license in the District of Columbia have been refused licenses unless they stated their color under oath. In this case, penalties of perjury could be exacted for false statements of color. In a case pending in the District Court for the District of Columbia, *Pedersen* v. *Burton* (C.A. No. 1877-71 D.C. D.C. 1971) the plaintiffs contend that the congressional statute requiring the Clerk of the D.C. Superior Court to "ascertain . . . the color" of all who wish to marry in the District of Columbia is unconstitutional. They argue that the resulting data are not currently used for any legitimate purpose, and that their color may have no legitimate bearing upon whether or not they may marry each other. In addition, they objected to the requirement that this information be supplied under oath. Although this information is required under oath, exhibit "A", the affidavit of Robert T. Nash, Chief Deputy Clerk of the District of Columbia Marriage License Bureau, stated that "It is the practice of the Superior Court . . . to accept whatever the applicant designates as his color (race), provided the answer is not obviously evasive." This exhibit also documents the utility of such information to the Federal Government.

[245] The number of cases in which self-perception of race or ethnic origin does not correspond to perception in the community is small. Further, minority group membership is less likely to evoke discriminatory treatment if this membership is not apparent to anyone; therefore, there is little need to require individuals to disclose racial or ethnic information which is private, i.e., minority group membership as perceived by self but conflicting with community perception.

by collecting no other identifying information as by head counts or anonymous surveys.[246]

Nevertheless, there are several objections to the use of these methods. First there is a possibility that the data collected may be unreliable. A person making a visual head count may lose interest in his assignment and report gross estimates rather than statistics based on a person-by-person count.[247] When anonymous surveys are used, there is no way to validate individual data on a sample basis.[248] Since identifying information such as names has not been collected, the racial and ethnic identities of particular persons cannot be denied or confirmed through the use of an alternative method of identification.

Even when reliable data may have been collected, there are severe limitations on the use of racial and ethnic data which are not connected with other identifying information. Although an anonymous survey or a visual head count can supply information about the racial or ethnic composition of a certain group of persons engaged in a particular activity at a fixed time, they do not permit longitudinal or followup studies on particular individuals.[249] Thus, for example, appropriate data collected by head counts or anonymous surveys could not be used later to identify the race or ethnic origin of successful applicants. If that information were desired, a second survey would be necessary.[250] when head counts or anonymous surveys are used to identify the race or ethnic origin of persons enrolled in a particular training program, information could not be used later to identify the race and ethnic origin of graduates of the training program or of trainees subsequently obtaining jobs in their fields. Separation of racial and ethnic data and other identifying information can also be accomplished by the use of special forms. It is possible to design forms so that racial and ethnic data are collected in conjunction with identifying information but are subsequently separated. The National Center for Health Statistics (HEW), for example, has designed forms for the collection of vital statistics,[251] which permit separation of confidential information on race, education, and previous marriages from name and address.[252] The use of such forms permits the validation of data collected and enables the identification of nonrespondents. It could be used both with data collected by visual observation and data collected by self-identification. The principal disadvantage of this method is that if the separation of racial and ethnic information from other identifying information is to act as a safeguard, it should probably occur at the time data are collected. Once the separation is made, no other data concerning an individual can be added to the file.[253] Use of the safeguard would not be practicable for data collection on particular individuals over an extended period of time,[254] and thus is subject to some of the same objections as head counts and anonymous surveys. The removal of racial and ethnic identifications might be delayed until after the purposes of the survey have been completed, as recommended by the Office of Management and Budget.[255] This has the advantage that over a period of time new information, such as changes in income or benefit status, can be added to a file and correlated with the racial and ethnic data collected. Nonetheless, without a specific statement in advance of data collection on what constitutes completion of the purposes of the survey, this may be too vague to serve as a satisfactory safeguard. Further, review of the nondiscriminatory operations of a Federal program must be a continuous and ongoing activity. When racial and ethnic data are collected to measure the extent of nondiscrimination in a Federal program, the purposes for which the data have been collected may never be completed.

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[246] Head counts have been used by the Forest Service (USDA) to identify users of recreational facilities. In this instance, however, they are used for expedience rather than to protect the identity of individuals. Interview with Albert McDowell, *supra* note 220.

Such mechanisms are recommended by the NAACP Legal Defense and Education Fund. Interview with Jack Greenberg, Director-Counsel, NAACP Legal Defense and Education Fund, Sept. 20, 1971. In contrast, the Mexican American Legal Defense and Education Fund believes that racial and ethnic data should be maintained at all stages of the employer-employee relationship including application, hiring, and termination, Obledo Letter, *supra* note 90. Maintenance of such extensive data would hardly be practicable on an anonymous basis, since the system would require continual additions.

The Office of Management and Budget also recommended that the best assurance of confidentiality is to solicit anonymous responses.

Office of Management and Budget, Clearance Office Manual *supra* note 242, Section 51. The use of anonymous surveys was recommended in all instances in which there is need for confidentiality and not specifically with regard to racial and ethnic data.

[247] With the use of anonymous surveys, validation might be particularly important since persons not in sympathy with racial and ethnic data collection or with the purposes of the particular surveys can provide erroneous or meaningless responses.

[248] A 1971 onsite inspection of Virginia State and municipal parks by the Department of the Interior indicates that an earlier survey of use of parks in Virginia conducted by State park officials provided inflated figures for black attendance. Department of the Interior Title VI "On-site Inspection Report of the Commonwealth of Virginia State and Other Municipal Parks". Inspection dates June 20-28, 1971.

[249] Longitudinal studies are studies in which data concerning particular individuals are obtained at intervals over a period of time.

[250] Head counts and anonymous surveys do not limit the capacity to do overall followup studies using group data.

[251] Vital statistics are data concerning birth, marriage, divorce and death.

[252] The National Center for Health Statistics sets optional standards for the State collection of vital statistics. Interview with Stanley Glaser, Reports Clearance Officer, Health Services and Mental Health Administration, Department of Health, Education, and Welfare, Aug. 27, 1971.

[253] For example, this safeguard would not be feasible if information regarding changes in amount of benefits and termination of benefits were to be added to a file containing race and initial amount of benefits.

Racial and ethnic designations can also be separated from other identifying information if racial and ethnic information is stored only in a code which is not generally known. Thus, racial or ethnic data could be recorded in forms used in the distribution of Federal assistance, for example, but remain inaccessible to persons responsible for making decisions regarding individuals. Such safeguards are, in fact, used by the Extension Service (USDA), the Food and Nutrition Service (USDA) and State Employment Services (DOL).[256]

The use of codes for storing racial and ethnic information is not subject to the same objections as the use of head counts and anonymous surveys. It enables the validation of data collected, and permits the use of racial and ethnic data for measurement of nondiscrimination at any phase in the program delivery process, not merely at the phase at which the data were collected. The use of codes for storing racial and ethnic data, however, do not provide strong guarantees against misuse or unauthorized release. For anyone who knows the code, the racial and ethnic data are accessible. Further, reviewing records of persons whose race and ethnic origin are known would facilitate breaking the code.

In cases in which racial and ethnic data are stored with other identifying information, Agency regulations prohibiting the release of individual data should be used to protect against the misuse of racial and ethnic data. There are, however, no governmentwide legal prohibitions on the release of information regarding the racial and ethnic identities of particular individuals. There are a few Federal prohibitions on the release of any information which may relate to individuals in general. None of these prohibitions, however, relate directly to data collected in conjunction with the administration of Federal programs of assistance.[257] Federal policy, as enunciated by the Office of Management and Budget, requires Federal Agencies "to respect and protect the privacy of persons, businesses, and other institutions to the maximum consistent with general public interest".[258] This policy is not a legally binding protection against the release of racial and ethnic data concerning individuals, which may have been collected by a Federal Agency.[259] The only way to assure that racial and ethnic data collected by Federal Agencies in conjunction with program administration will remain confidential and be used only for statistical purposes is by the enactment of a statute, or series of statutes, requiring that this be done.[260]

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[254] More complicated systems may also be designed which enable both files to be linked though a code number.

[255] Office of Management and Budget, Clearance Office Manual, *supra* note 242, Section 51.

[256] Interview with Arthur B. McCaw, Deputy Administrator, and staff, Food and Nutrition Service, Department of Agriculture, Aug. 4, 1971; interview with Edwin Kirby, Administrator, and staff, Extension Service, Department of Agriculture, Aug. 12, 1971; United States Employment Service Program Letter No. 2238, Department of Labor, June 23, 1967.

[257] Certain mandatory surveys administered by the Bureau of the Census, all of which carry a notice of how the data will be used, are required by law to be held in confidence by the Bureau of the Census. They may be used only for statistical purposes and may not be released from the Bureau of the Census in a form or manner which allows identification of any respondent. They are immune from the legal process. (13 U.S.C. Sec. 8, 9, 214.) Data gathered under the Public Health Service Act, 42 U.S.C. Sec. 242c (a) Amend. 1970. (Certain statistics collected by the National Center for Health Statistics at HEW are similarly required to be held in confidence.) It should also be noted that the Freedom of Information Act, 5 U.S.C. Sec. 522 (1966) is sometimes mistakenly viewed as a protection against the unauthorized release of information. To the contrary, this act was designed to protect the public by permitting access to information used by the Federal Government in program administration, such as rules, policies, and staff manuals. Although it contains exemptions allowing some personal information (probably extending to racial and ethnic classifications of individuals) to be maintained in confidence, the exemptions are not mandatory and the Freedom of Information Act does not *prohibit* the release of such information.

[258] Office of Management and Budget, Clearance Office Manual, *supra* note 242.

[259] The adequacy of Federal protections of confidential in-

One objection which has been raised to a legal prohibition against the release of racial and ethnic data is that such a prohibition would conflict with the purposes of data collection by limiting access to data on individuals and thus prevent other Federal Agencies and private groups with a legitimate need for them from obtaining them.[261] For example, data collected by the Social and Rehabilitation Service (HEW) on the race and ethnic origin of beneficiaries of programs administered through local welfare offices then could not be shared with the Food and Nutrition Service (USDA) which also conducts a program [the Food Stamp Program] administered through local welfare offices.

Sharing data does not generally require that individual identities be revealed. Often the maximum detail required for analysis will be aggregate data, perhaps at the recipient level.[262] Where one Agency requests another to supply data on the race or ethnic origin of particular individuals, arrangements can be made so that they are supplied in groups without revealing any individual identities. The Social Security Administration uses such a system to make data on groups of individual Social Security card holders available to other Agencies.[263] Thus, for example, the Veterans Administration could supply a list of participants (by Social Security number) in the VA education programs, and the Social Security Administration would then be able to tell the Veterans Administration the percent of program participants who were white, black, and other.

The unauthorized use of racial and ethnic data can be minimized by limiting the forms on which racial and ethnic designations occur.[264] The most complete safeguard is offered when this limitation is accomplished by recording racial and ethnic designations only on forms which have a restricted use. A lesser safeguard is accomplished by recording racial and ethnic data on all forms except those which have a particular use. The latter mechanism is used by the Department of Labor which directs Unemployment Insurance Offices to record information on color and minority group membership only on records which were held within the Unemployment Insurance Office, and not, for example, on notices sent to the last employer.[265]

It may also be desirable to devise forms so that racial and ethnic information is not contained on all copies. This could be accomplished by providing a space for racial and ethnic information on the original form but not on carbon copies. The use of such forms to limit the circulation of racial and ethnic data collection was not noted by any program managers interviewed for this study.

3. PROVIDING INFORMATION ABOUT THE PURPOSES OF DATA COLLECTION

To enlist the cooperation of respondents, reduce grounds for complaint, and increase response rate and accuracy, all inquiries about race or ethnic origin should include a clear explanation of the purposes of the request and assurances about the specific uses to which the information will be put and will not be put. Individuals providing racial or ethnic information should be assured that the information they

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formation is evaluated in *Federal Statistics*, a report of the President's Commission on Federal Statistics, Vol. 1, Chap. 6, 1971. The Commission found that there is no uniform definition of "confidential" as used in Federal Agency promises to protect individual privacy. Thus, public knowledge about legal safeguards is inadequate. Further, in many cases there is an absence of legal authority on the part of Federal Agencies to uphold promises to retain data as confidential.

[260] *Id.*

[261] Interview with Paul Feldman, Deputy Executive Director, President's Commission on Federal Statistics, July 2, 1971, and interview with Stanley Glaser, Reports Clearance Officer, Health Services and Mental Health Administration, Department of Health, Education, and Welfare, Aug. 27, 1971.

[262] See Section I. E. 2 for a discussion of the detail required in racial and ethnic data collection.

[263] Interview with Robert N. Heller, Special Assistant for Liaison with Users of Social Security Data, Social Security Administration, Aug. 25, 1971. See also, Department of Health, Education, and Welfare, "Some Statistical Resources Available at the Social Security Administration", 1967.

[264] Such restrictions are required for data collected as part of the Civil Service Commission survey of the race and ethnic origin of Federal employees. Federal Personnel Manual System Letter 290-2, Sept. 30, 1969.

[265] Unemployment Insurance Program Letter 919, Department of Labor, June 23, 1967. Such a safeguard is also recommended by the Equal Employment Opportunity Commission which urges that racial and ethnic identification of employees be kept separate from the employees' basic personnel forms and from other records available for use in personnel decisions (29 C.F.R. Sec. 1602.13, 1966).

supply is confidential and will not be released except when their identities are protected. The Department of Justice has recommended to the Department of Agriculture that any form which asks an individual to state his or her race should make clear that such information is to be used for determining compliance with the requirement of nondiscrimination.[266] Since self-identification has not been generally used by the USDA, however, this recommendation has not been affected. The Department of Labor has informed its beneficiaries of the purposes of its surveys although visual observation has been used. DOL issued fliers and posters announcing its data collection policy when it was initiated in 1967. Applicants to the Unemployment Insurance Offices and to the State employment security agencies were informed that their race, color, and national origin were being recorded on the applications filed with those offices so that it would be possible to tell if there were any employment discrimination against particular groups.[267]

The Department of Housing and Urban Development, while lacking written policy concerning the safeguards which should be applied, provides applicants with the explanation that the information requested will be used only for statistical purposes and only so HUD may determine the extent minority families make use of HUD programs. They also assure the applicant that the requested information will have no bearing on the processing of the application and cite the legal authority for collecting the data.[268]

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[266] Letter from David L. Rose, former Special Assistant to the Attorney General, to Merwin W. Kaye, former Director, Research and Operations Division, Office of the General Counsel, Department of Agriculture, Dec. 6, 1967.

[267] Department of Labor Leaflet: "A New Step Toward Equal Opportunity" undated.

[268] E.g., Federal Housing Administration Forms No. 29000, (Rev. 10/70) and No. 3131 (Rev. 11/70). Similar assurances are found on HEW's student application for a federally insured loan (OE Form 1154 2/70 Budget Bureau No. 51-R0649) and on the student application form issued by the Law Enforcement Assistance Administration at the Department of Justice (LEAA-AAB-3, Rev. 7/1/69, Budget Bureau No. 43-RO445).

III. Responsibility for Racial and Ethnic Data Collection and Use

A. FEDERAL AGENCIES WITH PROGRAMS OF ASSISTANCE

The absence of relevant agencywide requirements is a major reason for the minimal collection and use of racial and ethnic data in Federal programs. Some program managers and Agency officials believe that their responsibilities do not require racial and ethnic data collection. In some situations they believe that the Agency has no civil rights responsibilities or that civil rights responsibilities reside elsewhere in the Agency. Finally, some managers believe that they have achieved compliance with civil rights responsibilities and have no further responsibility for measuring nondiscrimination in the distribution of program benefits. Without Agency policy to the contrary, program managers acting on these beliefs are not likely to collect racial and ethnic data.

Some program officials have adopted a narrow view of their Agency's civil rights responsibilities, denying Agency authority to insure nondiscrimination in certain program areas. Thus, for example, the Assistance Payments Administration (HEW) has not collected racial and ethnic data to insure that money provided to States is distributed equitably and without discrimination on the basis of race or national origin. Program officials argue that they may not advertise for beneficiaries or try to add anyone to the welfare roles in the absence of a complaint. They say that a systematic survey of the extent to which minorities are participating in the Assistance Payments Administration programs would be outside their responsibility for insuring nondiscrimination and any action which would have the effect of "soliciting business" is prohibited.[1] When space in VA facilities, such as hospitals, is provided to national service organizations which assist disabled veterans, the Department of Medicine and Surgery (VA)[2] has taken no responsibility for insuring nondiscrimination in the membership practices of these organizations, arguing that responsibility for such oversight is not within its jurisdiction.[3]

In both of these cases, however, the Agency position may permit discrimination in the benefits provided. For example, if sufficient information about the right to benefit from Assistance Payments Administration programs has not reached potential minority beneficiaries, they may not even understand the facts thoroughly enough even to complain about the situation.[4] Similarly, if space is provided in Veterans Administration hospitals to service organizations which in fact do not have minority group members, the resultant services may not meet minority group needs. The organizations may be unfamiliar with the needs of minority group veterans and so their delivery of services may not be relevant to those needs. Minority group veterans may also resist accepting assistance from an organization with a record of discrimination against minorities which results in inequities in VA distribution of assistance. In both of these instances program benefits will not be reaching potential beneficiaries on an equitable basis, and without the collection of racial and ethnic data, program officials will be unaware of this. The resultant discrimination is, of course, prohibited in all Federal programs.

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[1] Interview with Frank Hanmer, Budget Officer, Assistance Payments Administration, Social and Rehabilitation Service, Department of Health, Education, and Welfare, Aug. 23, 1971.

[2] The Department of Medicine and Surgery provides medical benefits, such as hospital and outpatient treatment and care in nursing homes to veterans of the Armed Forces. It also operates hospitals and provides funds for research, hospital training, and the construction of nursing homes.

[3] Interview with William W. Parker, Director, Contract Compliance Service, Veterans Administration, Oct. 5, 1971. Implicit in this statement is a reaffirmation of the Veterans Administration's 1969 position that membership policies of those service organizations were not covered by Title VI of the Civil Rights Act of 1964. See U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort*, 1970, at 194.

[4] For example, it has been estimated that payments made under the Federal aided public assistance programs reach only a fourth of those whose incomes are below the poverty line and that many persons entitled to assistance do not apply for it. Clair Wilcox, *Toward Social Welfare*, 231, (1969). Planning, Office for Civil Rights, and Office for Civil Rights staff, Department of Health, Education, and Welfare,

1. Program Civil Rights Responsibilities

Even where Agency civil rights authority has been clearly accepted by program officials, these officials may not believe that responsibility for civil rights enforcement lies with them; they may argue that it properly belongs to some other office within the Agency, such as its office for civil rights. Thus, for example, the Office for Civil Rights at the Department of Health, Education, and Welfare often receives little cooperation from HEW program officials in its efforts to determine if HEW assistance is distributed on a nondiscriminatory basis.[5] Although data derived from the race and ethnic origin of participants in HEW programs are submitted to the Office of the Assistant Secretary for Planning and Evaluation, these data are rarely analyzed or interpreted by program officials. Most HEW programs have evinced little or no interest in measuring the distribution of program benefits to minority group citizens and concern themselves primarily with what they perceive to be their major function—awarding a given number of dollars through grants and contracts within a specific time limit. HEW program officials generally regard the responsibility for insuring and measuring nondiscrimination in HEW programs to reside within the departmental Office for Civil Rights.[6] Program officials who take this line of argument, however, are denying responsibilities which in fact are legitimate program obligations; among these is the duty to know if their program benefits are being distributed equitably to all racial and ethnic groups. Effective administration of Federal programs, notably those aimed at alleviating the problems of minority groups and the poor, is closely dependent upon nondiscrimination. Effective program administration necessitates that all eligible beneficiaries are informed about their rights to program participation and that discriminatory barriers to application are removed. If a minority group is excluded from or uninformed about program benefits to which it is entitled, this represents not only discrimination but a failure in program administration.

2. Program Responsibility to Collect Racial and Ethnic Data

Some program officials who have not collected racial and ethnic data have argued that it is not necessary for them to do so since their distribution of assistance is equitable and, therefore, no discrimination exists in the administration of their programs. These officials state that they accept responsibility for assuring nondiscrimination in their programs and that they would collect racial and ethnic data if it were necessary; they believe, however, that it is not. Because of the absence of complaints from individuals, organizations, or other Government Agencies, because of the use of impersonal mechanisms[7] for the distribution of assistance, and because of long experience with their programs, these officials express confidence that they cannot be functioning in a nondiscriminatory way.

Among the Agencies in which program officials cite the absence of complaints as proof that there is no discrimination within their programs, is the Extension Service (USDA).[8] This contention is made despite extensive allegations from other sources of inequities in the delivery of Extension Service benefits.[9]

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[5] Interview with John Hope II, Assistant Director for Planning, Office for Civil Rights, and Office for Civil Rights staff, Department of Health, Education, and Welfare, Aug. 12, 1971.

[6] *Id.* The responsibility for taking affirmative action to insure against nondiscrimination is not widely accepted by program officials at the Veterans Administration either. The Insurance Service (VA), which collects a large amount of data on applicants for insurance, reports that it does not collect data on race or ethnic origin because these data are not necessary for administering the program. Interview with Marvin Drebes, Assistant Director for Standards and Evaluation, Veterans Administration, Aug. 4, 1971.

[7] Some programs have initiated the use of impersonal mechanisms such as strict guidelines and computer review of qualifications in an attempt to eliminate or reduce the use of human judgment in the determination of eligibility.

[8] Interview with Edwin Kirby, Administrator, and staff, Extension Service, Department of Agriculture, Aug. 12, 1971. The Extension Service's basic function is to help rural residents identify and solve their farm, home, and community problems through the use of research findings and programs administered by the Department of Agriculture. Another program citing this argument was the Compensation, Pension, and Education Service (VA); interview with J.T. Taaffe, Director, Compensation, Pension, and Education Service, and staff, Veterans Administration, Aug. 13, 1971.

[9] The Department of Agriculture can hardly lay claim to a lack of knowledge about discrimination in services and employment opportunities in Extension Service programs. The U.S. Commission on Civil Rights pointed out such problems in 1965, 1967, 1968, and 1969 (U.S. Commission on Civil Rights, ***Equal Opportunity in Farm Programs***

In general, absence of complaints is a poor indicator of the extent of nondiscrimination in a Federal program.[10] There is widespread agreement that few victims of discrimination ever file complaints.[11] Procedures for processing complaints may be lengthy, inadequate, or even nonexistent. Hence, grievances about the operation of a program may never be translated into formal complaints which are seen by Federal program officials.[12] Victims of discrimination may choose not to file a complaint[13] because of reluctance to become involved in the complaint process[14] or because of skepticism about the outcome.[15] In the absence of knowledge about available benefits and in the absence of knowledge about their own eligibility for them, many potential beneficiaries may not even realize that discrimination has occurred.[16] There are instances in which program officials do not collect racial and ethnic data because they believe that their program is in so much public view that any discrimination would be noted immediately by another Federal Agency or by a private organization. The Department of Medicine and Surgery (VA) does not use racial and ethnic data to evaluate the extent of nondiscrimination in VA hospital treatment because program officials believe that if discrimination occurred it would be immediately noticed by such organizations as the American Medical Association or the American Legion.[17] This statement might be more acceptable if a thorough and systematic review of Veterans Administration medical facilities had been conducted by outside

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(1965); *Equal Opportunity in Federally Assisted Agricultural Programs in Georgia*, (1967); *Alabama Hearing* (1968), and *Equal Opportunity in the Mississippi Cooperative Extension Service* (1969).) The Inspector General of USDA, in a series of audits extending back to 1966, found widespread noncompliance: service was generally limited along racial lines, many 4-H clubs and related activities were segregated, and minority employees were generally subordinated to majority group officials regardless of education or experience. A recent followup to one of these audits, conducted in late 1971, revealed that although some progress had been made since 1969, extensive noncompliance remained. Inaction on the part of USDA in meeting its civil rights enforcement responsibilities has resulted in several private suits against State extension services and an uncontested finding in one State by a Federal court of widespread racial discrimination against minority employees and rural residents. *Strain* v. *Philpott*, 331 F. Supp. 836 (M.D. Ala. 1971).

[10] In the area of employment, there is general agreement that complaints do not accurately reflect the incidence of discrimination. See Note, "The California Fair Employment Practice Commission: Stepchild of the State Agencies," 18 *Stan. L. Rev.* 203 (1965); Bamberger and Lewin, "The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation," 74 *Harv. L. Rev.* 531 (1961); Hearings on S. 773, S. 1210, S. 1211, and S. 1937 Before the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare, 88th Cong. 1st Sess., 282 (1963).

[11] Girard and Jaffe "Some General Observations on Administration of State Fair Employment Practices Laws," 14 *Buffalo L. Rev.* 115 (1964); H. Hill, "Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations," 14 *Buffalo L. Rev.* 24 (1964); Witherspoon, "Civil Rights Policy in the Federal System; Proposals for a Better Use of Administrative Process," 74 *Yale L. J.* 1171, 1190 (1965).

[12] Absence of information about how to process a complaint, or to whom the complaint should be addressed will deter individuals from making complaints. Established complaint procedures may also be intimidating or require extended effort. Many individuals will thus accept injustices which have occurred rather than go through the complications which such filing entails.

[13] E.g., New Jersey Governor's Select Commission on Civil Disorder: *Report for Action*, 73 (1968). Failure to file a complaint does not indicate that such victims are uninterested in the matter. E.g., Blumrosen, "Antidiscrimination Laws in Action in New Jersey: A Law-Sociology Study," 19 *Rutgers L. Rev.* 200 (1965).

[14] Note, "The California Fair Employment Practice Commission: Stepchild of the State Agencies," 18 *Stan. L. Rev.* 203 (1965) *supra* note 10; Bamberger and Lewin, *supra* note 10 at 526; R. B. Dyson and E. D. Dyson, "Commission Enforcement of State Laws Against Discrimination: A Comparative Analysis of the Kansas Act," 14 *Kan. L. Rev.* 29, 37 (1965).

[15] Blumrosen, *supra* note 13 at 200; 205 Dyson and Dyson *id* at 34; Sovern, *Legal Restraints on Racial Discrimination in Employment*, 33 (1966).

[16] Witherspoon, *supra* note 11 at 1192. This is illustrated by a study conducted in 1969-70 at the University of Michigan, demonstrating that despite passage of both Title VII of the Civil Rights Act of 1964, prohibiting discrimination in private employment, and the Equal Pay Act of 1963, which requires that all employers subject to Federal minimum wage provisions give equal pay to men and women for equal work, women earned on the average $3,500 a year less than men who were equally qualified in education, seniority, and responsibility. Only 8 percent of the women surveyed, however, reported that they believed they had been discriminated against. See Levitin, Quinn, and Staines, "Sex Discrimination Against the American Working Woman," *American Behavioral Scientist*, Vol. 15, No. 2, at 237-254. November-December 1971. Similarly, black farmers who may be receiving less assistance from the Extension Service than white farmers in the same area, may have no idea of the extent of the service to which they are entitled or the extent of the service being received by white farmers.

[17] Interview with Bernard Kaufman, Director of Reports and Statistics and J. Herbert Smith, M.D., Deputy for Professional Services, Department of Medicine and Surgery, Veterans Administration, Aug. 4, 1971.

organizations and had uncovered no discrimination. It would also show more veracity if the reviewers had included representatives from such organizations as the Medical Committee for Human Rights,[18] the National Association for the Advancement of Colored People, the Japanese American Citizen's League, the Urban League, the American G. I. Forum, the National Medical Association,[19] or the American Veterans Committee, all organizations whose primary concerns are the elimination of discrimination.[20]

More subtle forms of discrimination which come from failures in program planning might well go unnoticed by groups not specifically interested in conditions of minority groups. Absence of personnel speaking a particular language or familiar with a particular culture is one form of discriminatory treatment. Absence of medical and research programs for the treatment and prevention of diseases which primarily affect particular racial and ethnic groups, may be discriminatory. Discrimination may also occur by disregarding minorities' preferences, the types of food served, the entertainment or reading material offered, or the cosmetics available. This cumulative disregard of special needs tends to discourage minority participation.

The National Highway Traffic Safety Administration[21] (DOT) does not use racial and ethnic data to monitor driver safety programs because it believes that any discriminatory practices would be uncovered by compliance review.[22] Although data are collected on the race and ethnic origin of persons actually receiving such assistance, this is considered unnecessary by program officials who argue that compliance reviews would uncover any discrimination.[23] But program officials cannot rely solely upon compliance reviews to determine the extent of nondiscrimination in their programs. Compliance reviews are costly and are not usually conducted on every recipient. In fact, no Title VI compliance reviews for the second half of Fiscal Year 1971 were conducted for either the National Highway Traffic Safety Administration or the Federal Highway Administration.[24] Even if compliance reviews are conducted they cannot serve as a substitute for firm racial and ethnic data because the data themselves are important in the systematic conduct of compliance reviews.[25] If, for example, the practice of giving driving tests only in English limits the number of Asian American, American Indian, or Spanish surnamed persons who pass these tests, this limitation could be documented by an examination of test results, by race and ethnic origin, more easily than by onsite inspections.

In some cases in which decisions about the distribution of assistance to individuals are made impersonally, having been prescribed by law or strict guidelines, program officials tend to argue that racial and ethnic data collection is unnecessary. The Department of Medicine and Surgery (VA), for example, does not collect information on hospital admission by race because it asserts that applicants for admission are served according to Veterans Administration guidelines.[26] Program managers insist that all applicants needing hospital treatment are admitted to the hospital.[27] Patients are not admitted, they say, only if they do not require hospital caré or can be given necessary treatment on an outpatient basis.[28]

Demand for medical services, however, may exceed the available capacity of medical facilities and there are Veterans Administration hospitals which cannot immediately treat all those with a medical need for admission.[29] Thus, decisions to admit patients cannot always be made solely on medical grounds.

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[18] The Medical Committee for Human Rights, an organization of medical and nonmedical persons, is interested in preserving the rights of all minorities with special emphasis on the deprived particularly in the area of health services.

[19] The National Medical Association is a national professional society of predominantly black physicians which has a special interest in civil rights.

[20] It should be noted that effective and systematic reviews by these organizations would probably require the collection of racial and ethnic data.

[21] The National Highway Traffic Safety Administration provides assistance, coordination, and leadership for programs to improve motor vehicle and pedestrian safety.

[22] Interview with R. L. Harper, Office of Civil Rights, and staff, National Highway Traffic Safety Administration, DOT, Sept. 9, 1971.

[23] Interview with Alexander Gaither, Director of Civil Rights, Federal Highway Administration, and Federal Highway Administration staff, DOT, Sept. 9, 1971.

[24] Attachment to Oct. 8, 1971, letter to the Commission from Secretary of Transportation, John A. Volpe.

[25] See Section I B. 2, a for a discussion of the use of racial and ethnic data in compliance reviews.

[26] Kaufman interview, *supra* note 17. Veterans with service-connected injuries or illnesses are treated first. Veterans with other ailments are given second priority, and all others are treated on a "first come first served" basis.

[27] *Id.* About 65 percent of all applicants are admitted to VA hospitals.

[28] *Id.*

[29] *The Washington Post*, Oct. 4, 1971, at A2, stated that the waiting list for one hospital in Atlanta included 140

The Insurance Service (VA)[30] does not collect racial and ethnic data on applicants for or holders of insurance policies.[31] Program officials report that insurance is available to all eligible veterans and that few applications are turned down.[32] This argument, however, ignores the fact that guidelines for determining eligibility may not be comprehensive enough to eliminate subjectivity. Even in the process of determining medical eligibility, there can be disagreement.[33] In addition, while the decision to provide insurance may be based upon condition of health, there may be a tendency to reject persons who appear to be a greater insurance risk than others and assessment of this risk could be related to racial or ethnic factors.[34]

The possibility that minority group persons may be evaluated as greater health risks than nonminorities can be assessed with data on race and ethnic origin of insurance applicants. Further, the prevalence of nonservice-connected ailments might be greater among one racial and ethnic group than another, and the resulting application of criteria for selection may thus be discriminatory.[35] Finally, there are possibilities of discrimination at points in the delivery process other than the acceptance of applications. These occurences would not necessarily be covered by guidelines from the Veterans Administration. Such factors as the establishment of insurance rates, the terms for borrowing of insurance, provisions for making late payments, and the location of insurance offices all may be potential tools for discrimination.

Confidence in nondiscrimination because the nature of the decisions on eligibility for assistance is impersonal was also found at the Compensation, Pension, and Education Service (VA).[36] Program officials indicated that eligibility will soon be determined by computer, which will eliminate what the staff believes to be any possibility of discrimination.[37] Again, this position ignores the possibility that the requirements for eligibility may themselves be discriminatory. For example, shorter life expectancy for particular racial or ethnic groups might result in decreased minority participation in VA pension plans which do not produce income for the participant until he or she reaches 65 years of age.[38] Inaccessibility of vital and other records for blacks might result in fewer pension benefits being paid to retired veterans and to wives and children of deceased minority veterans.[39] Reliance

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persons. The Veterans Administration reports that the size of this waiting list was the result of an intensive outreach program to inform Vietnam Veterans of available benefits. The waiting list in that hospital in early March 1972 was 13. Interview with Stratton Apfelman, Assistant Director of News and Liaison, Information Service, Veterans Administration, Mar. 6, 1972.

[30] The Insurance Service, in the Department of Veterans Benefits, provides life insurance protection for veterans at costs less than privately obtained insurance.

[31] Drebes interview, *supra* note 6.

[32] *Id.*, the usual reason for rejecting applicants is for failure to meet health requirements. A special insurance program is provided for persons with service-connected disabilities. Persons with nonservice-connected medical conditions may have difficulty in obtaining insurance. The decision of medical eligibility is made by the private companies providing the insurance and not by the Veterans Administration.

[33] Applicants for VA medical insurance must be in "good health" as determined by a licensed doctor of medicine or an osteopath. An insurance agency for a leading insurance company informed Commission staff that insurance companies frequently include what they consider to be "moral and hazardous conditions" in assessing eligibility, leading, for example, to a greater rejection rate for persons living in inadequate housing.

[34] See Standard N. Sesser, "Big Brother Keeps Tabs on Insurance Buyers," *New Republic*, Apr. 17, 1968, for evidence that racial and ethnic factors have been considered by insurance companies not relevant in making decisions to provide insurance in determining eligibility for life insurance policies. Major insurance companies consider such factors as crowded living conditions, sanitation of the applicants' residence, drinking habits, and personal reputation.

[35] E.g., death rates due to tuberculosis for nonwhites (8.4 per 100,000 population) are three times that of whites (2.8 per 100,000 population). HEW, *Vital Statistics of the United States*, Vol. II, *Mortality*, Part A, Table 1-8.

[36] The Compensation, Pension, and Education Service in the Department of Veterans Benefits provides compensation for service-connected deaths for veterans' dependents, pensions for veterans with nonservice-connected disabilities, pensions to widows and children of wartime veterans whose deaths were not due to service, and assistance to veterans for higher education.

[37] Interview with J.T. Taaffe, Director, Compensation, Pension, and Education Service, and staff, Veterans Administration, Aug. 13, 1971.

[38] See Section I note 86 for a discussion of mortality statistics.

[39] As the result of a recent study, the Social Security Administration has reported that the following documentations of age were less available for blacks than for whites: birth, baptismal, and school records, and drivers licenses. Letter from Ida C. Merriam, Assistant Commissioner for Research and Statistics, Social Security Administration, to Cynthia N. Graae, Federal Evaluation Division, U.S. Commission on Civil Rights, Mar. 13, 1972. Social Service agencies which have needed records of birth and marriage to determine eligibility have reported greater difficulty in obtaining these records for blacks than for whites. Interview with Jessie Banks, Family Relocation Officer, District of Columbia Redevelopment Land Agency, Feb. 9, 1972.

upon impersonal mechanisms as the sole protection against discrimination in programs of Federal assistance also ignores the possibility that discrimination may occur at points in the delivery process other than at the determination of eligibility. For example, discrimination might occur in the services rendered or in the availability to minorities of information about program benefits.[40] Thus, although impersonal mechanisms appear to reduce opportunity for racial and ethnic discrimination in decisionmaking, they do not eliminate the need to measure the extent to which minority groups are participating in Federal programs.

Some program officials report that they have personal knowledge of the nondiscriminatory operation of their programs, and assert that the collection of racial and ethnic data would not reveal any additional information about it.[41] The Health Services and Mental Health Administration (HEW),[42] for example, reports that collection of racial and ethnic data in certain programs directed to low-income persons [43] would not be worthwhile, since almost all program beneficiaries are black.[44] Such an assertion is, of course, an oversimplification. Any program aimed at low-income groups but serving only blacks would indeed be discriminatory. Poverty is a problem which plagues many groups. A disproportionate number of the members of many different minority groups are poor, including Mexican Americans, Puerto Ricans, American Indians, and Filipinos. And a large number of the poor are not members of racial or ethnic minority groups. Data are needed to insure that *all* racial and ethnic groups are receiving their fair share of the benefits of these programs.

To have an accurate picture of the extent of nondiscrimination in the distribution of program benefits, it is necessary to have detailed information about each recipient. Although it would be commendable if program officials were personally familiar with the extent to which their program benefits are being equitably distributed, such knowledge is hardly possible without recourse to individual statistics on the race and ethnic origin of beneficiaries, applicants, and persons eligible for program benefits.

Closely aligned with confidence in nondiscrimination because of familiarity with program administration is confidence in nondiscrimination because the program "serves everyone". Airports and highways, for example, are open for use to the general public and program officials in the Federal Highway Administration and the Federal Aviation Administration state that data on the users of these facilities cannot and need not be collected because everyone is entitled to use them.[45] This, however, does not take into account the myriad of allegations of discrimination in these programs. For example, because of the location of highways and airports, access may differ for some racial and ethnic groups. Highways may provide new impetus for whites to move to the suburbs, leaving greater concentrations of minority groups in the cities, as has been alleged in Selma, Alabama.[46] They may divide or destroy a minority business community as has been alleged in Nashville, Tennessee,[47] or they may constitute a physical barrier between minority and majority communities as has been alleged in Tulsa, Oklahoma [48] and the Watts community of Los Angeles, California.[49]

Although the reasons given by Federal program officials for neglecting to collect and use racial and ethnic data are varied, perhaps the single most important factor related to the failure to adopt this important tool is the absence of Federal policy requiring that they be collected and used. Although USDA, DOL, HEW, and HUD have policies or requirements regarding racial and ethnic data, essential elements of comprehensive agencywide systems for collection and use are missing from all Agencies studied. Three of these, the Departments of Agriculture, Housing and Urban Development, and Labor, have clearly defined operating policies which require the collection of racial and ethnic data with regard to program participation.[50] As a result of these policies, there are more data collected in these Agencies for the express purpose of assessing distribution of program benefits to minority group persons than are found in the Department of Health, Education, and Welfare, the Department of Transportation, or the Veterans Administration. Although racial and ethnic data have been collected in many HEW, DOT, and VA programs, the purpose of their collection has been related to medical documentation, research, or general purpose data use and has had little to do with the measurement of the distribution of program benefits to minority group persons.[51] In contrast, racial and ethnic data are collected to measure the distribution of program benefits by the Manpower Administration at the Department of Labor and for selected programs in a number of USDA constituent agencies. Such data collection is now being initiated for all HUD programs.[52]

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[40] W. Breed: "The Negro and Fatalistic Suicide," 13 *Pacific Sociol. Rev.* at 156-162 (1970).

[41] See, for example, U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort*, at 262.

[42] The Health Services and Mental Health Administration was established as part of the Public Health Service by the Apr. 1, 1968, reorganization of the Department of Health, Education, and Welfare. It was established to provide leadership and direction to health programs in this country. Its major operating components include the National Center for Health Services Research and Development, the National Center for Health Statistics, the National Institute of Mental Health, the Community Health Service, and the Indian Health Service.

[43] Such programs include Newborn Care which provides health care to infants from low-income families during their first year of life and Children and Youth Projects which provide comprehensive health services to children from low-income families.

[44] Interview with Stanley Glaser, Reports Clearance Officer, Health Services and Mental Health Administration, Department of Health, Education, and Welfare, Aug. 27, 1971.

[45] Gaither interview, *supra* note 23 and review with John Choroszy. Acting Director of Civil Rights, Federal Aviation Administration staff, DOT, Sept. 13, 1971.

[46] *Clarke School Urban Renewal Project Area et al.*, v. *Romney et al.*, C.A. 6310-70-P (S.D. Ala.) 1970.

[47] *Nashville I-40 Steering Committee* v. *Ellington* 387 F. 2d 179 (1961) .

[48] *Mapleridge* v. *Volpe*, C.A. 72-C-53 (U.S.D.C., N.D. Okla.) Feb. 18, 1972.

[49] *Keith* v. *Volpe*, C.A. 72-355-HP (C.D. Calif), 1971.

To be effective, an agencywide policy must not only require that racial and ethnic data be both collected and used. It must set standards to insure quality and uniformity in data collection and use. It must also provide for the monitoring of data collection and analysis to insure quality in these efforts. The need for such provisions is illustrated by the system of racial and ethnic data reporting which is in effect at HEW.

While HEW requires that each program report dollar outlays by the race and ethnic origin of its beneficiaries, this has not been interpreted by HEW program managers as a requirement to collect data on the racial and ethnic origin of program beneficiaries. Instructions for reporting data have allowed the use of estimates on some "reasonable basis".[53] Monitoring of the reporting system with regard to the quality of racial and ethnic data has been almost nonexistent. As a result, data of archaic vintage and poorly supported estimates have been submitted. Program officials themselves admit that the quality of these data has often been poor.[54]

In general, Federal Agency requirements are not uniform throughout the Federal Government and consequently have resulted in uneven collection and use of racial and ethnic data. For example, while both the Department of Agriculture and the Department of Labor require collection of racial and ethnic beneficiary data, DOL does not require the collection of racial and ethnic data on persons eligible to be beneficiaries and USDA does not require the collection of applicant data. HEW requires that data be submitted to the Office of the Assistant Secretary for Planning and Evaluation, and USDA issues summaries of the data collected in an Agency publication on participation in its programs.[55] No Agency has required that data collected be analyzed.

Following a review of the data collection systems of the 12 Federal Agencies with the largest outlays for domestic assistance,[56] the Interagency Racial Data Committee[57] published in April 1971 a model for agencywide racial and ethnic data collection systems. It was based on an intensive analysis of six of those Agencies.[58] Together with OMB staff, it then met with representatives of the Agencies to discuss the implementation of this model for the improvement of Agency systems of data collection and use. The end product of each review was a memorandum of understanding written by the Committee and Agency officials regarding the plan for racial and ethnic data collection.[59] Recommendations concerning such things as Agency monitoring of program data collection and use, written policy statements, improvement of response rate and agencywide publication of racial and ethnic statistics for use in program planning and evaluation were made, contingent upon the status of racial and ethnic data collection and use within each Agency's organizational structure. Essentially, however, these plans were aimed at the goals of developing and implementing requirements for the collection and use of both eligibility and beneficiary data to suit the particular Agency needs. No review has been conducted of the implementation of these plans and, therefore, it is too early to determine if they will result in measurable improvement.[60]

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[50] Secretary's Memorandum 1662, Supplement No. 1, Department of Agriculture, July 27, 1970; W. Willard Wirtz, Secretary of Labor 1962-68, address at the Convocation of the NAACP Legal Defense and Education Fund, New York, N.Y., May 18, 1967, and Department of Labor, United States Employment Service Program Letter 2238, June 23, 1967; Department of Labor, Manpower Administration Order No. 18-17, July 20, 1971; memorandum from George W. Romney, Secretary of Housing and Urban Development of all HUD Assistant Secretaries and the General Counsel, "Collection of Racial and Ethnic Data" Apr. 8, 1970, and 36 Fed. Reg. 10782 (June 3, 1971).

[51] Only VA housing programs systematically collect racial and ethnic data to assess the extent to which program benefits were equitably distributed. These programs included the sale of property acquired by the Veterans Administration, the direct loan program, and the VA Guaranteed Housing Program. As of March 1972, however, in VA housing programs more data were being collected than were being used. Interview with Karen Krueger, Staff Assistant, Equal Opportunity in VA-Guaranteed Housing, Mar. 10, 1972. At the Department of Transportation, although data have been collected on the race and ethnic origin of persons relocated because of Federal activity, they have not been separately available for Spanish surnamed persons, Asian Americans, or American Indians, and the use of the collected data has been extremely limited.

[52] See Interagency Racial Data Committee, "The Racial Data Policies and Capabilities of the Federal Government," (1971) for a more thorough discussion of the extent of racial and ethnic data collection in the Departments of Agriculture; Commerce; Health, Education, and Welfare; Housing and Urban Development; Interior; and Labor.

[53] Department of Health, Education, and Welfare, *Long Range Program Planning System; Program Planing Structure*. (Blue Book) at 104, 1971.

[54] Glaser interview *supra* note 44. Interview with Carl Yordy, Assistant Administrator, Health Services and Mental Health Administration, Department of Health, Education, and Welfare, Aug. 30, 1971.

[55] See Department of Agriculture, *Participation in USDA Programs*, July 1971.

B. THE OFFICE OF MANAGEMENT AND BUDGET

Among the principal responsibilities of the Office of Management and Budget (OMB) are to design, execute, and promote the evaluation of the objectives, performance, and efficiency of Federal programs and to develop information systems which will make available to the President data on the performance of Federal programs.[61] The Bureau of the Budget, OMB's predecessor organization, had placed little emphasis on program evaluation,[62] and one aim of the creation of the Office of Management and Budget in July 1970 was to correct this deficiency. OMB was to focus on the means of implementing national policy and evaluate the manner in which Agencies carry out their program assignments. A key phrase used by the President in describing the evaluations which should be conducted by OMB was "assessing the extent to which programs are actually achieving the intended results, and delivering the intended services to the intended recipients."[63]

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[56] The 12 Agencies were the Departments of Agriculture; Commerce; Health, Education, and Welfare; Housing and Urban Development; Labor; and Transportation; and the Law Enforcement Assistance Administration (Department of Justice); The Bureau of Outdoor Recreation (Department of the Interior); The National Science Foundation; the Small Business Administration the Appalachian Regional Commission; and the Veterans Administration.

[57] The history of this Committee is discussed in Section I note 72.

[58] The Departments of Agriculture; Commerce; Health, Education, and Welfare; Housing and Urban Development; Interior; and Labor.

[59] See transmittal letters for these memoranda from Margaret A. Cotter and Morton H. Sklar, Co-Chairmen, Interagency Racial Data Committee to: Mr. Frank Elliot, Assistant Secretary for Administration, Department of Agriculture, Aug. 19, 1971; Robert A. Podesta, Assistant Secretary for Economic Development, Department of Commerce, Dec. 15, 1971; J. Stanley Pottinger, Director, Office of Civil Rights, Department of Health, Education, and Welfare, Sept. 22, 1971; George W. Romney, Secretary, Department of Housing and Urban Development, Dec. 9, 1971; G. Douglas Hofe, Jr., Director, Bureau of Outdoor Recreation, Department of Interior, Nov. 17, 1971; Jerris Leonard, Administrator, Law Enforcement Assistance Administration, Department of Justice, Dec. 3, 1971; Malcolm Lovell, Assistant Secretary for Manpower, Department of Labor, Jan. 4, 1972; Thomas S. Kleppe, Administrator, Small Business Administration, Feb. 14, 1972; William S. Heffelfinger, Assistant Secretary for Administration, Department of Transportation, Jan. 19, 1972; and William W. Parker, Acting Assistant to the Administrator for Civil Rights, Veterans Administration, Jan. 10, 1972. The attached memoranda summarized agreements made among representatives of the Committee, OMB, and the Agency concerned regarding the need for guidelines and the means of implementing a system of collecting and using eligibility and beneficiary data. The differences in these memoranda were essentially based on the current status of data collection and use in each Agency and the extent of change necessary; the goals for all Agencies were alike.

[60] The Committee plans to issue a report summarizing its activities and including the agency plans for racial and ethnic data systems. These plans will also be submitted to the Office of Management and Budget. Interview with Morton H. Sklar and Margaret A. Cotter, Co-Chairmen, Interagency Racial Data Committee, May 10, 1972.

[61] The Office of Management and Budget, which is part of the Executive Office of the President, was created by Reorganization Plan No. 2 of 1970. It assumed the responsibilities of its predecessor organization, the Bureau of the Budget, for the preparation of the Budget and for the regulation of Federal statistical collection.

[62] The Advisory Council on Executive Organization, established on Apr. 1, 1969, conducted a review of the organization of the Executive Branch, and found that the activities of the Bureau of the Budget (BOB) were dominated by the preparation of the Budget and that BOB's review of Federal programs was insufficient. See also Joseph S. Wholey, *Federal Evaluation Policy: Analyzing the Effects of Public Programs*, the Urban Institute, 58-61, (1970) for a discussion of the evaluation of Federal program performance by the Bureau of the Budget.

Because such assessments would probably yield different results for various racial and ethnic groups, an effective OMB program evaluation should examine the extent to which Federal programs are reaching intended beneficiaries separately for each racial and ethnic group and the extent to which the intended results are achieved for each group. This would entail the comprehensive use of racial and ethnic data.[64]

In October 1970, for the first time, the Director issued a requirement that civil rights issues be included in the budget hearing process.[65] This requirement is noteworthy because it marked the introduction of OMB policy to use of the Budget process to review civil rights issues. No specific requirements were made to obtain information from Federal Agencies about the nondiscriminatory operations of their programs, however, and no instructions were issued for implementing this requirement. On March 25, 1971, the Director again instructed all OMB examiners[66] to include civil rights issues in the budget examination process, and also exhorted the management staff to make civil rights concerns an integral part of its regular functions.[67] To implement the inclusion of civil rights in the budget process, he directed changes in the *Examiner's Handbook* and in requirements for Agency budget submissions.[68]

As a result, minimal requirements for attention to civil rights were set for the 1973 budget season.[69] July and August 1971 revisions in the *Examiners' Handbook* instructed budget examiners to review Federal Agency civil rights activity.[70] Although the Handbook sets down the basic guidelines for budget examiners, it contains no provisions for the review of the distribution of program benefits to minorities.

Examiners were not specifically instructed to review the extent to which Federal programs were reaching minority beneficiaries, however, and Agencies were not specifically instructed to provide information relevant to this analysis. Budget examiners thus evidenced little concern with such evaluations, and the budget process did not generally serve as a stimulus to most Federal Agencies to conduct this evaluation themselves.

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[63] Statement by the President to the Congress of the United States, Accompanying Reorganization Plan No. 2 of 1970, Mar. 12, 1970.

[64] See Section I B, 2, b for a more complete discussion of the uses of racial and ethnic data for program evaluation.

[65] OMB officials were instructed to use the budget hearing process to identify civil rights issues and to convey OMB's interest in this area to all Federal Agencies. Memorandum from George P. Shultz, Director, Office of Management and Budget, to OMB Assistant Directors and Division Chiefs, Oct. 30, 1970. Much of OMB's evaluation of Federal programs is intimately connected with the process of reviewing Agency budgets. Through the process of budget examination, the President and Executive Branch make clear their priorities by allocating dollars to various Federal goals.

Cornerstones in the process are the Agency budget submissions and the review of these submissions by OMB.

After an Agency budget has been submitted and reviewed by OMB staff, the Agency head appears before OMB officials at the budget hearing for detailed questioning concerning Agency programs.

[66] OMB staff is divided into budget divisions, consisting mainly of examiners, and management divisions, consisting mainly of management analysts.

Budget examiners are responsible for reviewing the performance of Agency programs and for making recommendations for performance improvement. They assess the allocation of financial and staff resources and Agency workload. They provide suggestions for the correction of deficiencies, and bring any unresolved problems to the attention of OMB decisionmaking officials. There are approximately 200 budget examiners in OMB, each responsible for the review of budget submissions of Agencies, groups of Agencies, or one or more Agency subdivision.

OMB evaluation of program performance extends beyond that conducted as part of the Budget process to the reviews conducted by the Management Divisions. These include systematized evaluation of objectives and operations of select programs, with a view toward improving programming performance. (See pp. 72-73 for a discussion of the Performance Management System and special reviews in areas of national interest conducted by OMB's Program Coordination Division (PCD).) These reviews are generally of activities which cut across Agency lines and are of specific interest to the President. Until mid-1971, however, these reviews did not focus on civil rights activities. On March 25, 1971, the Director of OMB, George P. Shultz, instructed PCD to review activities involving civil rights problems, and since that time the Division has conducted reviews on such matters as Federal assistance to black colleges and Federal deposits for minority banks.

[67] Memorandum from George P. Shultz, Director, Office of Management and Budget, to OMB staff, Mar. 25, 1971. Detail on the OMB mechanisms which are to be used to monitor Federal civil rights enforcement has also been outlined in the Feb. 17, 1971, inquiry of the U.S. Commission on Civil Rights; and Response of the Office of Management and Budget to the Sept. 14, 1971, inquiry of the U.S. Commission on Civil Rights. See U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort: One Year Later,* 1971.

[68] Memorandum from George P. Shultz, *Id.*

[69] The Budget season begins for most Agencies with their submissions to OMB in September and ends when their budget is approved by OMB in December although major Departments file a preliminary budget with OMB in the late spring. The Fiscal Year 1973 Budget was received by OMB in the fall of 1971. Fiscal Year 1973 begins in July 1972 and ends in June 1973.

[70] Examiners were particularly requested to focus attention upon affirmative action plans for Agency employment. They were not required to investigate the extent of equitable distribution of program benefits.

Concomitant revisions in Circular A-11,[71] which specifies OMB basic policy on Agency budget submissions, directed Federal Agencies to include factors relating to civil rights performance in their submissions. The revisions inform Agencies that plans and estimates for civil rights policies will be reviewed by OMB. Circular A-11 does not request specific data on the race and ethnic origin of beneficiaries and potential beneficiaries of Federal programs. This circular is now used to provide detailed specification for budget data and could be a principal vehicle for OMB to obtain statistics on the race and ethnic origin of potential beneficiaries of, applicants to, and present beneficiaries of Federal programs and to insure that appropriate racial and ethnic data were collected and reviewed by Federal Agencies. But, to date, it has not been so used. The general directives set down in the *Examiner's Handbook* and in Circular A-11 have not yet been translated into specific requests for racial and ethnic data.[72]

The 1971 revisions in Circular A-11 resulted in an increase in the material submitted by Federal Agencies to OMB concerning their civil rights programs and a concomitant increased attention paid by budget examiners to Agency civil rights enforcement activities in the 1973 Budget season. This attention, however, was generally directed to Agency civil rights programs including the enforcement of requirements of contract compliance and Federal equal employment opportunity and Title VI of the 1964 Civil Rights Act but not toward measurement of the extent to which Federal programs are reaching minority beneficiaries.

A memorandum from the Director in October 1971 provided additional guidance to the examiners and other OMB staff in their overseeing and coordination of program civil rights responsibilities.[73] This memorandum included suggestions for the measurement of the assistance provided by Federal programs to minority beneficiaries. It recommended the examination of racial and ethnic data of participants and of persons eligible to participate in Agency programs in order to protect any discrepancies between the two. It also suggested a comparison of the amount of benefits provided to various racial and ethnic groups. These guidelines did not indicate what constitutes a discrepancy or how to detect situations which are inequitable. Nonetheless, despite the fact that they are incomplete, guidelines for collection and use are an important ingredient of any racial and ethnic data system and it is noteworthy that OMB has issued them. Unfortunately, these guidelines were issued too late for significant impact on the 1973 Budget. Further, they were not mandatory, and many budget examiners considered racial and ethnic data on program beneficiaries and those eligible for assistance as nonessential to their evaluation assignment.

Increased emphasis on civil rights in the budget examination process has been reflected in the review of broad issues by OMB decisionmaking staff. This year for the first time, OMB conducted a Spring Preview and Fall Director's Review on civil rights issues.[74] The civil rights reviews focused on such matters as civil rights expenditures and women's rights. If adequate racial and ethnic data were available throughout the Federal Government, however, these reviews could be used to provide the necessary background for an examination of the extent to which there is equitable distribution of Federal assistance and for review of proposed resolutions to any inequities uncovered.

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[71] OMB Circular A-11, "Preparation and Submission of Annual Budget Estimates," Section 13.2 (rev., June 1971) states that "Agencies will assure that estimates reflect full consideration of the administration's goals and responsibilities in the civil rights area. Such consideration should include, but not be limited to: equal employment opportunity, programs of Federal financial assistance (Title VI of the Civil Rights Act of 1964), minority business procurement, affirmative action plans of Federal contractors, fair housing practices, Federal deposits in minority banks and school desegregation."

[72] As a result of issues raised in the fall 1971 Director's Review, in October 1971, OMB set up an interagency task force to design a model for inclusion in Circular A-11. It is expected that revisions in Circular A-11 will be issued for the 1974 budget season requesting that Agencies supply data on minority participation in Federal programs.

[73] Memorandum from George P. Shultz, Director, Office of Management and Budget, to OMB staff, Office Memorandum No. 72-17, Oct. 19, 1971.

[74] These are reviews in which OMB staff presents papers on key issues for consideration by the senior decisionmaking staff of OMB. They are conducted for all Agencies in subject matter areas of major interest to OMB, such as public works, resource and development, statistical policy, and water resources. Presentations are generally oral, although those for small Agencies may be written. In the fall 1971 Directors' Review, one of the issues considered was the collection of racial and ethnic data. Such questions as why they have not been collected, how they should be collected and stored, and the development of OMB policy regarding racial and ethnic data were reviewed.

The OMB emphasis on civil rights also extended to the publication of the Budget. As part of the 1973 Budget, the first Special Analysis of the Federal Government's civil rights activities was published.[75] Agency budget submissions did not contain adequate data for this report[76] and, therefore, prior to the preparation of this Analysis, a specific request for all relevant data was issued to Federal Agencies. Because of the widespread lack of racial and ethnic data, little useful material on distribution of program benefits was forwarded to OMB. Consequently, the Special Analysis on civil rights focused on Federal outlays for civil rights enforcement and programs specifically designed to provide assistance to minorities[77] and, although economic and social programs involving minority participation were reviewed in Special Analysis of those programs, only scant attention was paid to the extent of assistance to minorities.[78] Those Analyses contained some data on the characteristics of beneficiaries of social programs[79] (for example, data on the age of beneficiaries of health programs) but only in the Analysis of Manpower programs was the percent participation of minority groups given.[80]

Now with a clearly stated responsibility for program evaluation, which is of specific interest to the President, OMB has placed some emphasis on the evaluation of civil rights programs. Nevertheless, it has not yet required that systematic reviews of program performance be conducted with regard to minority beneficiaries and potential beneficiaries. As executed, OMB's performance of Federal programs has focused on the assistance received by minority group persons only in cases in which particular budget examiners with an interest in civil rights enforcement have reviewed data on minority participation on an *ad hoc* basis.

The absence of attention by OMB budget examiners to the measurement or assessment of benefits delivered by Federal programs to minority groups is particularly significant because for most programs no one in the Federal Government, neither within the Agencies administering programs nor within OMB, has any concrete knowledge of the extent to which Federal programs are actually reaching minority beneficiaries.[81] In addition, because no governmentwide directive has been issued requiring Agencies to collect or submit information to OMB on potential beneficiaries, applicants, or beneficiaries, and because such data are generally lacking, it would have been difficult for examiners who were interested in doing so to analyze the distribution of Federal benefits to minorities.

It should be noted that an OMB requirement for the submission of racial and ethnic data would have to be accompanied by guidelines for their collection in order to insure quality in the data submitted. Without such guidelines, data might be submitted, not because Agencies had confidence in them, but only because they were required, as in the case of data submitted by some HEW programs to the HEW Office of Planning and Evaluation.[82] Moreover, guidelines are necessary to insure that Agencies have available adequate data to conduct indepth analyses of their own programs. Without guidelines, agencies might obtain only data aggregated regionally or nationally. Although this could be sufficient for OMB analysis of Federal programs, it would be inadequate for Agency examination of the distribution of benefits by particular recipients.[83] For example, the Agency might make provision for States to submit State totals, and then be unable to retrieve data on particular recipients.

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[75] A Special Analysis is a review of a subject in terms of its funding, goals, policies, and output. It is published as part of the President's Budget. The data in a Special Analysis are often obtained from Agency budget submissions, providing a great more detail, however, than data published in the *Budget of the United States.*

The Special Analysis on Civil Rights was included with the Special Analyses of other Federal Social Programs.

[76] Interview with Walter W. Haase, Chief, Management Information Systems Division, and staff, Oct. 21, 1971.

[77] The analysis of estimated outlays of 1973 was presented in terms of previous outlays, which in many cases provided little information about the adequacy of the budget for civil rights. For example, although it was indicated that in Fiscal Year 1973 more than $42 million would be provided for minority higher education, an increase from 1973 of more than 40 percent, there was no indication of the amount of total Federal educational assistance or the extent to which the assistance, not specifically earmarked for minority education, was distributed equitably. The programs specifically designed to assist minorities considered in the Special Analysis were programs for American Indians, minority business enterprise, and minority higher educational assistance. Budget of the United States Government, *Special Analyses* 1973.

[78] In the Fiscal Year 1973 Budget, Special Analyses are included for education, manpower, health, income security, crime reduction, housing, and civil rights programs. *Id.*

[79] In health programs, data were reported on the age and disability of beneficiaries; in manpower programs, data were reported on sex, age, education, economic status and disability; in income support programs, data were reported on beneficiary characteristics related to age, parental status, employment, and income level. *Id.*

[80] Minority races comprised 39 percent of manpower program participation in 1971. Similar data have been reported in the Special Analyses of manpower programs for several years. Separate figures were not given by race or ethnic group, and there was no indication as to which "minority races" were included in this Analysis. See Budget of the United States Government, 1973, *supra* note 77.

[81] In some instances budget examiners have reviewed statistics relating to such factors as the size of the disadvantaged population being served as, for example, in the reviews of Manpower Administration programs where Federal law requires that a given proportion of participants be disadvantaged. These data do not, however, provide information about the extent to which benefits are equitably distributed to minority groups. OMB has also traditionally collected data from each Manpower Administration program on total minority participation. Because this information has not been provided separately for each racial and ethnic group, it could not be used to assess the extent to which program benefits are reaching intended beneficiaries of all groups.

OMB has been studying the feasibility of a racial and ethnic data requirement. In this regard, it has assigned several staff members to participate with the Interagency Racial Data Committee in a review of the activities and capabilities of Federal Agencies for collecting and using racial and ethnic data.[84] Although plans for the improvement of racial and ethnic data systems in each of the Agencies studied resulted from this review, OMB endorsement of these plans, in fact, was not officially communicated to the Agencies. While there has long been a need for OMB to issue Federal requirements and standards for racial and ethnic data collection and use, this review did not result in governmentwide directives to overcome deficiencies in existing data collection systems.[85]

In addition to the budget process, OMB has two other responsibilities which provide it with the authority to regulate Federal racial and ethnic data collection and use: oversight of Federal statistical activities and development of systems of Federal program evaluation. OMB is charged by Congress with the regulation of Federal statistics for the purpose of improving the gathering, compilation, analysis, publication, and distribution of statistical information for any purpose by Federal Agencies.[86] In addition, Executive Order 10253 assigned OMB the specific responsibility for maintaining a continuing study for the improvement of Agency statistical work in the light of changing statistical needs.[87] Included in the specific functions prescribed are to improve the reliability and timeliness of statistical information, and to achieve maximum comparability among statistical series.[88]

OMB approval is required for all questionnaires and administrative forms including applications and claim forms used in the operation of Federal programs.[89] The requirement for approval covers all methods of data collection including questions asked in mail surveys inquiries made in personal or in telephone interviews,[90] and all administrative forms which are completed in writing by an applicant or beneficiary. In approving data collection by Federal Agencies, OMB has attempted to minimize the burden upon those furnishing statistical data needed by the Agency,[91] and to reduce costs of data collection.

It is also the function of the clearance procedures to improve the quality and increase the general utility of the statistics collected. In general, OMB's role has often been to eliminate unnecessary data gathering and improve the collection of data when necessary. It has not functioned to encourage collection of additional statistics in order to increase information available for effective program operation. Despite the fact that the usefulness of most beneficiary data is increased when information about race and ethnic origin is included, the form's clearance procedures have not been used as a primary vehicle of insuring that all beneficiary data be collected by race and ethnic origin. In the absence of a clearly formulated policy with regard to the necessity and use for racial and ethnic data collection, OMB procedures for statistical regulation have thus not generally served to increase the amount of racial and ethnic data available for program planning and evaluation.

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[82] See Section I, B-C for a discussion of the quality of data submitted to the HEW Office for Planning and Evaluation.

[83] While Federal Agencies are responsible for insuring that the operations of each recipient are nondiscriminatory, the Office of Management and Budget is responsible for the overall review of Agency programs and would not generally examine the activities of particular recipients.

[84] See Section I, note 72 for a further discussion of this Subcommittee's activities.

[85] OMB reported that the principal findings of OMB staff members were the general absence of clearly stat program goals and the failure to incorporate the few goals which existed into routine program planning and management processes. Response of the Office of Management and Budget to the Sept. 14 inquiry of the U.S. Commission on Civil Rights. No recommendations based on this findings have been issued governmentwide.

[86] This responsibility was assigned to the Bureau of the Budget, OMB's predecessor organization, by the Budget and Accounting Procedures Act of 1950, 31 U.S.C. Sec. 18b (1950).

[87] Exec. Order No. 10253, June 13, 1951.

[88] *Id.*

Section J of the Federal Reports Act of 1942 (44 U.S.C. Sec. 3509) requires OMB approval for all Federal Agency requests for information from 10 or more persons.

[90] Bureau of the Budget, *Statistical Services of the United States Government*, Rev. 1968, at 5.

[91] This is required by Executive Order 10253, June 13, 1951.

Until August 1971, the approval of Agency data collection plans was the sole responsibility of the Statistical Policy Division of OMB. Forms were judged primarily on their statistical merits rather than upon the extent to which the data collected would or would not fill the administrative needs of the program. At that point, primary responsibility for clearance of administrative forms was transferred to the budget examination divisions from the Statistical Policy Division to insure that approved forms were in "full accord with agency program objectives."[92] Since then, when an Agency has presented a data collection plan for approval to OMB, the budget examiner with responsibility for the particular program involved has participated in the clearance procedures.[93] Forms with civil rights implications are also reviewed by the OMB civil rights budget examiners.[94]

In principle, this change in responsibility should expand the role of the forms clearance procedures beyond the elimination of unnecessary data collection to insure that agencies collect and use the data necessary for program evaluation. But the inclusion of budget examiners in the forms clearance procedures has not been used systematically to encourage Agencies to gather statistics relating to the distribution of program benefits to minorities. No OMB directive has been issued to examiners instructing them that in exercising this new function they should insure that program officials are able to measure the extent to which their programs are serving minorities. The extent to which the process is used to review their benefit distribution is still highly dependent upon the outlook of individual examiners, some of whom disapprove of racial and ethnic data collection because they still perceive this as a means for accomplishing, rather than reducing, discrimination. And OMB has issued no directive to examiners informing them of the acceptability of inquiries into race and ethnic origin for the purposes of measuring discrimination.[95]

In addition to the responsibility for approval of forms used by Federal Agencies, OMB has the authority to issue regulations with regard to Federal statistical procedures. On March 28, 1952, the Bureau of the Budget issued Circular A-46, which sets forth requirements for Federal statistics.[96] This circular provides guidelines for reporting racial and ethnic data. Exhibit K to this circular specifies terminology to be used in racial designations.[97]

OMB has recently issued to Federal Agencies and users of Federal data proposed amendments to the Circular for comment.[98] If issued without further changes, the amendments would require Agencies collecting racial and ethnic data to use either the racial ethnic categories of American Indian, Asian American, Negro/Black, Spanish descent, and other in their collection, or the racial categories of American

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[92] Response of the Office of Management and Budget to the Sept. 14, 1971, inquiry of the U.S. Commission on Civil Rights.

[93] The Statistical Policy Division retains primary responsibility for issues of a technical nature and retains overall forms clearance responsibility. While it has approved many Federal forms used for the collection of racial and ethnic data, it has not operated with a policy regarding the collection of racial and ethnic data.

[94] The Civil Rights budget examiners are the two examiners who staff the civil rights unit within the General Governments Program Division of OMB. This division was established in the late spring of 1971. The examiners' activities include budget examination of such Agencies as the Community Relations Service of the Department of Justice, the Equal Employment Opportunity Commission, and the U.S. Commission on Civil Rights. They also provide guidance in civil rights matters to other budget examiners, and serve on the staff of the Committee on Civil Rights of the Domestic Affairs Council.

[95] In early 1972, this Division requested the opinions of Federal Agencies and private organizations concerning the advisability of collecting racial and ethnic data on application forms in such areas as education and employment. The responses to this request are currently being reviewed.

[96] Bureau of the Budget, Circular A-46, *Statistical Procedures*, March 28, 1952. Circular A-46 sets forth standards for statistical publication, statistical surveys, and forms design. Guidelines are provided for on a few select topics such as the definitions of standard metropolitan statistical areas, classification of scientific and engineering areas, and classification of race and ethnic origin. See p. 37 for a further discussion of the use of Circular A-46 with regard to designation of race and origin.

[97] Bureau of the Budget, Exhibit K to Circular No. A-46, Race and Color Designations in Federal Statistics, Aug. 8, 1969. Currently, the guidelines relate only to the collection of data on whites, blacks, and other minority races. See Section II, C 4 for a discussion of the adequacy of these categories.

[98] Letter from Frank C. Carlucci, Associate Director, Office of Management and Budget, to Rev. Theodore M. Hesburgh, C.S.C. Chairman, United States Commission on Civil Rights, Feb. 3, 1972.

Indian, Asian American, Negro/Black, White, and other combined with the ethnic categories of Spanish descent and other. Thus, two alternative methods of determining race or ethnic origin are provided. In one method, racial and ethnic categories are included in a single list. In the other method, both a racial and an ethnic designation must be made for each person.

There are several basic shortcomings to this proposal. By permitting the use of alternative categories of race and ethnic origin, the opportunity to standardize racial and ethnic designations in Federal statistics is lost. Further, there is little use for data which separates racial and ethnic designations; in this case, separate data would be made available on white and black persons of Spanish descent.

The proposed revisions do not request Spanish data on Mexican Americans, Puerto Ricans, Cubans, Chinese, Japanese, or Filipinos, nor do they provide guidelines indicating the circumstances under which detail on these groups is necessary, as for example in data collection on a local level.[99]

There is also a great need for governmentwide standardization of the techniques of racial and ethnic data collection. The wide variety of material used by Federal Agencies for determining minority group membership includes, for instance, self-perception, ancestry or parentage, community perception, and appearance. OMB has not used Circular A-46 to fill the needs for standardization and upgrading of the quality of Federal racial and ethnic statistics. The Circular provides no guidance on how the data should be collected. In fact, the Circular permits both the use of self-identification and visual observation, although given the categories prescribed, accuracy dictates the use of self-identification. No definitions of the categories were given except in terms of country of origin;[100] there was no indication as to whether any of such factors as parentage, appearance, or self-perception should be used in determining race or ethnic origin.[101] No concomitant requirements were made for safeguards of individual privacy or against the misuse of the data collected.[102]

It should also be pointed out that standards in Circular A-46 apply only to Federal Agencies which have already made a decision to collect racial and ethnic data. Such limited application is deficient in the face of the great need for racial and ethnic data on beneficiaries of Federal programs. Circular A-46 makes no requirement that Agencies collect data by race or ethnic origin. OMB thus permits the situation in which Agencies collect such beneficiary data as number, age, sex, or income without gathering data on race or ethnic origin. Thus, although Circular A-46 provides some guidance for the collection of racial and ethnic data, it in no way insures that data necessary for measuring distribution of program benefits to minorities will be collected.

OMB also provides some guidance to a select number of Federal programs in statistical collection and analysis through the Performance Management System. This is a recently inaugurated system of program evaluation designed by OMB management analysts and has been used by OMB in a limited number of programs to improve Federal management processes in such areas as crime prevention and drug abuse. In applying this system, OMB reviews existing program goals, timetables for executing these goals, and data collection systems and then participates with Federal Agencies in setting or confirming program goals and timetables and in improving data collection for measuring progress toward those goals.

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[99] In many cases groups within the proposed categories have different characteristics and needs. In some cases, too, there is a need for separate data on groups within those categories because extreme discriminatory conditions for one group may be masked by less discriminatory conditions for another. For example, although the Federal Government has taken affirmative action to improve Federal employment opportunities for persons [illegible] Spanish descent, it is not known if this has been equitable for all national origin groups within the category of Spanish descent.

[100] For example, Spanish descent was defined as "includes persons of Puerto Rican, Mexican American, Cuban, Central or South American, or other Spanish descent."

[101] The proposed amendment directs that surname and language spoken are not permissible as the sole criteria for group membership.

[102] An additional shortcoming of the proposed revision was that both the Bureau of the Census and the Social Security Administration were to be exempt from the requirements of this Exhibit. The racial and ethnic categories currently used by these Agencies do not, however, even meet the minimal standards set forth in the proposed amendment. BOC did not collect data on persons of Spanish descent in the 100 percent sample of the 1970 Decennial Census and the Social Security Administration has used only the categories of "black", "white", and "other", in its data collection. The data collected by these Agencies are used as a resource by many other Agencies. Thus, they may need data in a greater number of racial and ethnic categories than most other Federal Agencies. Nonetheless, this need for greater detail should not exempt them from the reporting requirements of Exhibit K. These Agencies should be required to collect data which, at the very least, can be aggregated to the categories set forth in Exhibit K.

The first step in implementing this system is for the program manager and his staff to re-evaluate the basic program objectives and review the rationale supporting those objectives. For example, an objective of Federal programs of assistance should be to serve persons of all racial and ethnic groups on an equitable basis. Performance measures related to those objectives are then defined by such factors as the number of beneficiaries served by race and ethnic origin. The next step in implementing the system is to standardize the performance measure to insure quality and uniformity in the data collected. For example, at this point, in the area of Federal programs of assistance, it would be necessary to standardize measures of race and ethnic origin programs of assistance. The program manager sets target values for each performance measure, indicating realistic expectations for performance in the next year. Targets might be set for the number of minority beneficiaries to be served. Measurements are then taken, generally on a quarterly basis. An analysis is made of the data collected, determining the extent to which targets are met. Any necessary changes in program are then effected and the performance management cycle starts again.

More than a year ago, OMB's directive instructed the performance management system to be used to insure that "the achievement of civil rights goals is clearly and specifically included among the performance responsibilities of program managers." [103] Although this system could be adopted for review of Federal programs of assistance, it has not been widely used to measure the extent of distribution of benefits to minorities in any program. In fact, to date, it has been implemented for only a limited number of programs relating to civil rights. These include the programs of the Equal Employment Opportunity Commission and the Office of Minority Business Enterprise.

The principal drawback to relying on this system for an evaluation of the extent to which Federal programs are reaching minorities is that its development in any given area has been slow. Nonetheless, if it were applied to Federal programs of assistance, it could itself be one of the most important uses of racial and ethnic data within the Federal Government. It could also be used to provide direction to the collection and use of racial and ethnic data throughout the Government.

Not only would the results of such an evaluation by OMB be of extreme importance, but the widespread use of this system could insure that Federal programs engage in self-evaluation. The system could be used by OMB to provide guidance to Federal Agencies in their evaluation of the assistance offered to minorities and to insure that such evaluations were conducted.[104] Because the system combines data collection and data use and elicits the cooperation of program managers, it has the potential to affect quality both in racial and ethnic data collection for program evaluation and in the analyses which are conducted with those data.[105] Because program managers themselves would be actively involved in the use of data collected for implementation of this system, they would have a vested interest in insuring that the data submitted represented valid measurements, and were not submitted merely to satisfy a reporting requirement with little intrinsic utility for themselves. Further, OMB involvement in the performance management system would serve to monitor and improve the quality of the data collected.

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[103] Memorandum from George P. Shultz, Director, Office of Management and Budget, to OMB staff, Mar. 25, 1971.

[104] Implementation of this system has been slow in the area of civil rights. OMB staff members report that they have been hampered by a general absence of clearly stated and measurable civil rights goals and a lack of data to measure performance.

[105] The fact is that the operation of the Performance Management System depends upon the cooperation and contribution of program managers and upon the use of the data collected by the Agencies themselves. The Agencies, too, have an interest in collecting high quality data, rather than merely reporting data to OMB because it was requested.

IV. Legal Issues[1]

A. AUTHORITY[2]

Three authorities exist for collecting racial and ethnic data to determine whether or not Federal programs of assistance are administered so that eligible minority beneficiaries receive benefits on an equitable basis.

First, authority for such data collection exists under civil rights laws. Title VI of the Civil Rights Act of 1964, which prohibits discrimination in federally assisted programs, is recognized by many Agencies as the prime authority for requiring the collection of racial and ethnic program data.[3] In general, Agency

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[1] In addition to the discussion which follows, it should be noted that legal opinions on the authority of Federal Agencies to collect racial and ethnic data have been issued by several such Agencies.

1. Letter from Martin F. Richman, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Kenneth F. Holbert, Acting General Counsel, Equal Employment Opportunity Commission, Aug. 4, 1967. This letter discusses the authority to collect racial and ethnic data under Title VII of the Civil Rights Act of 1964, and the relationship of such requirements to State and local laws prohibiting racial and ethnic data collection.

2. Letter from David L. Rose, Special Assistant to the Attorney General, Department of Justice, to Merwin W. Kaye, Director, Research and Operations Division, Office of the General Counsel, Department of Agriculture, Dec. 6, 1967. This letter discusses the authority to collect racial and ethnic data on participation in programs covered by Title VI of the Civil Rights Act of 1964 and in programs of direct assistance; it discusses the general power of the Secretary to require such data collection.

3. Memorandum and attachment from Norman C. Roettger, Acting General Counsel, Department of Housing and Urban Development to Samuel J. Simmons, Assistant Secretary for Equal Opportunity, Department of Housing and Urban Development, Sept. 8, 1970. This memorandum discusses the authority to collect racial and ethnic data under Executive Orders 11063, 11246, and 11478, Title VI of the Civil Rights Act of 1964, and Title VIII of the Civil Rights Act of 1968. It also analyzes the use of contract provisions to establish the authority to collect racial and ethnic data, the Secretary's authority to require such collection, and the impact of HUD regulations on State and local laws.

4. Memorandum from Gerald L. Paley, Associate Solicitor, to Ellen Sehgal, Manpower Analyst, Manpower Administration, Department of Labor, Sept. 1, 1971. This memorandum discusses the authority to collect racial and ethnic data under Titles VI and VII of the Civil Rights Act of 1964 and under Executive Order 11246. It evaluates the status of State and local laws prohibiting inquiries or recordkeeping concerning race, color, or national origin.

5. Memorandum from David B. Marblestone, Chief, Title VI Section, Civil Rights Division, Department of Justice, to James P. Robinson, Budget Examiner, General Government Programs Division, Office of Management and Budget, "Legality of Collecting Data on the Race of Beneficiaries of Federally Assisted Activities," Dec. 21, 1971. This memorandum discusses the general authority of the Federal Government to collect data with regard to federally assisted programs, the authority to collect racial and ethnic data, the right of individuals to privacy, and the conflict between State and local laws and Federal racial and ethnic data collection requirements.

[2] There are, in fact, no Federal regulations which prohibit racial and ethnic data collection. There are regulations which limit the method of collection of racial and ethnic data. It is important to note that these limitations pertain to Federal and private employment and do not relate to the collection of data on applicants to, beneficiaries of, or potential beneficiaries of Federal programs. Racial and ethnic origin of Federal employees may be recorded, but "only by visual survey and only in the form of gross statistics," (32 Fed. Reg. 11847, 1967). Civil Service Commission rules require that "No Executive Branch employee with authority to recommend personnel action . . . shall make any inquiry concerning the race . . . of an employee or applicant." (5 C.F.R. Part 4 Sec. 4.2, 1963). Regulations regarding collection of data by private employers (29 C.F.R. Sec. 1[illegible]3, 1966) state that employers may acquire racial and ethnic information "either by visual survey . . . or . . . by the maintenance of past employment records." These regulations do not state that other methods are prohibited, but the Employer Information Report (EEO-1) on which this information must be supplied to the Equal Employment Opportunity Commission states: "Eliciting information on the racial or ethnic identity of employees is not encouraged."

[3] For example, HUD's Title VI regulations (24 C.F.R. Sec. 1.6(b) (1964)) state:

> Compliance reports. Each recipient shall keep such records and submit to the responsible Departmental official or his designee timely, complete, and accurate compliance reports at such times and in such form and containing such information as the responsible Department official or his designee may determine to be neces-

Title VI regulations require that recipients keep such records and submit such reports as directed by the Agency for use in determining compliance with Title VI. The Civil Rights Act of 1866 is also an authority for racial and ethnic data collection, and in the specific field of housing, authority is provided by Title VIII of the Civil Rights Act of 1968.[4] Both Title VI and Title VIII prohibit discrimination by local governments, corporations, and private individuals. Title VI also imposes enforcement responsibilities upon the Federal Government.

Not all Federal programs of assistance, however, are covered by specific civil rights law. Financial assistance which is provided by way of contracts of insurance or guaranty is exempt from the requirements of Title VI. Such assistance would include Federal insurance of bank deposits and accounts in savings and loan associations, Federal insurance of home mortgages, and Federal guarantees of small business loans.[5] Programs in which assistance is administered directly by the Federal Government to the beneficiary are also not covered by Title VI. Such assistance includes payments made by the Social Security Administration,[6] direct loans provided by the Farmers Home Administration,[7] and technical assistance provided by the Soil Conservation Service.[8]

A second justification for racial and ethnic data collection is the executive power, which authorizes inquiry into program operations.[9] The exercise of such authority was illustrated in *Contractors Association of Eastern Pennsylvania* v. *Shultz*.[10] In this case, the authority of the Executive Branch to issue an affirmative action plan for nondiscrimination, requiring in part the collection of racial and ethnic data, was upheld. The opinion stressed that the power of the President is great when he is acting pursuant to an expressed or implied authorization of Congress or when he acts in reliance on his independent powers where Congress abstains or acquiesces in Presidential action.[11]

Thus, it must be assumed, in the absence of statutory regulation, that Congress gave the Executive a general authority to protect the Federal interest by "assuring that the largest possible pool of qualified manpower be available . . . ." for such federally aided construction.[12]

> sary to enable him to ascertain whether the recipient has complied or is complying with this Part. . . .

Similar regulations have been issued by other Federal Agencies with Title VI regulations. All Federal assistance which is extended to beneficiaries through recipients is covered by Title VI. Thus, discrimination is prohibited in assistance which is extended through public (State or local) or private entities. For example, discrimination is prohibited in the Food Stamp Program (USDA) in which State welfare agencies provide Federal assistance to low-income families to increase their food purchasing power; in the Rent Supplement Program (HUD), in which payments are made to owners (non-public) approved multifamily housing rental projects to supplement the rental payments of eligible tenants; and in the Federal-Aid Highway Program (DOT) in which assistance is provided to State highway departments for construction of Interstate highways and for construction and improvement of State roads.

[4] In the area of employment, authority for collecting racial and ethnic data exists under Title VII of the Civil Rights Act of 1964 which established the Equal Employment Opportunity Commission.

[5] Although contracts of loan and guaranty are not within the scope of Title VI, Section 808(d) of the Fair Housing Act of 1968 provides that "all executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this title. . . ." The President's statement interpreting this provision on Federal policies relative to equal housing opportunity indicates that Federal housing programs of guaranty and insurance must be administered on a nondiscriminatory basis and that HUD and other related Agencies should affirmatively implement such a program. Thus, in the area of their loan and guaranty programs, nondiscrimination is mandated by the 1968 legislation. See Statement by the President on Federal Policies Relative to Equal Housing Opportunity, June 11, 1971.

[6] The Social Security Administration makes monthly cash payments to eligible retired or disabled workers and to eligible dependents of deceased workers; it also makes payments for medical services to the aged (Medicare).

[7] The Farmers Home Administration makes loans to farmers for housing and for farm operations.

[8] The Soil Conservation Service provides technical assistance to farmers, ranchers, and private landowners for soil and water conservation and to arrest deterioration of crop and grazing lands.

[9] The executive branch has a constitutional duty to "take care that the laws be faithfully executed." (U.S.C.A. Const. Art. 2, § 1, 3) thus placing on that branch a responsibility for overseeing the execution of laws, as written, and thus conferring a broad authority to take action necessary to that end. *Moyer* v. *Brownell* 137 F. Supp. 594 (D.C. Pa. 1956).

[10] 442 F. 2d 159 (3rd Cir. 1971).

[11] *Id.* It is also interesting to note that the Third Circuit Court upheld the plan for minority hiring and the concomitant racial data recordkeeping requirement despite the existence of a Pennsylvania law prohibiting employers from keeping racial or ethnic records. It was argued that local law prohibiting the maintenance of racial information must give way where it conflicts with a plan adopted pursuant to a valid exercise of Presidential power.

[12] The Department of Justice has also interpreted that the general power of the Secretary of Agriculture over the

A third authority for collecting racial and ethnic data lies in the power given to the Executive Branch from specific program statutes. Many Federal program statutes specify that recipients maintain specific records or work records designated by the Agency responsible for administering that program. Thus, beneficiary data may often be collected pursuant to the program statute itself.[13] In addition, statutory provisions commonly authorize Agencies to issue rules and regulations necessary for the administration of an act.[14] Such provisions are also contained in civil rights legislation,[15] providing power which enables departmental Secretaries to promulgate regulations authorizing data collection necessary to properly enforce their responsibilities under the various civil rights acts. HUD has utilized this authority to promulgate Sec. 60.2 of its regulations which requires grant recipients to provide such racial and ethnic data as HUD may determine is necessary to enforce the Federal civil rights laws.[16]

This authority of the departmental Secretaries is not dependent on Presidential action or further congressional initiatives. It exists by virtue of present law and its interpretation by the courts and the respective Agencies.[17]

B. CONSTITUTIONAL PROTECTION AGAINST THE INVASION OF PRIVACY

The issue, simply stated, is whether the collection of racial and ethnic data by Federal Agencies in monitoring their outlays of assistance violates any constitutional privacy rights. It will be of primary importance to determine whether there is an inherent right to privacy respecting all or some personal information and to correlate this with whether requests for such information on a strictly voluntary basis moots the privacy issue.

Although this report advocates that such information be provided on a voluntary basis, the Commission believes that the operative premise should be that an element of coercion or intrusion is never totally absent.[18] Further, it is clear that when a person refuses to provide such information the official charged with its collection will have to resort to visual, or another form of subjective identification. Since the applicant has already opted not to provide the information, it is arguable that such subjective techniques are intrusive in nature. Consequently, it is best to assume *arguendo* that this information, whether secured by "voluntary" self-identification or through visual (or another form of) identification,

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operation of his Department [see 5 U.S.C. 301 (Supp. II, 1965-66)] to include the authority to require information on the race of beneficiaries of programs of direct assistance although regulations for nondiscrimination in USDA programs (7 C.F.R. Sec. 15.50) do not include regulations for implementation. Rose letter, *supra* note 1.

[13] 7 U.S.C. § 3019(b)—Food Stamp Act:

> There shall be kept such records as may be necessary to ascertain whether the program is being conducted in compliance with the provisions of this chapter and the regulations issued pursuant to this chapter.

42 U.S.C. § 3751—Omnibus Crime Control and Safe Streets Act of 1968:

> The administration is authorized . . . to establish such rules, regulations, and procedures as are necessary to the exercise of its functions and are consistent with the stated purpose of this chapter.

§ 3769(a)

> Each recipient of assistance under this Act shall keep such records as the Administration shall prescribe. . . .

[14] Statutory recordkeeping requirements are an appropriate means of monitoring compliance with the law and of ascertaining other pertinent facts. *United States* v. *Darby*, 312 U.S. 100 (1940); *Bowles* v. *Beatrice Creamery Co.*, 146 F. 2d 774 (10th Cir. 1944); *Ray* v. *United States*, 374 F. 2d 638 (5th Cir. 1967). Regulations on recordkeeping and inspection will be upheld if reasonably related to the purposes of a Federal statute. *Dixon* v. *United States*, 381 U.S. 68, 74 (1965)

[15] Title VI regulations contain such a provision.

[16] In the case of HUD, the civil rights responsibilities of the Secretary include enforcing Title VIII of the Civil Rights Act of 1968, which prohibits discrimination in mortgage lending and in the sale or rental of housing; Executive Order 11063 which prohibits discrimination in the sale or leasing of federally assisted housing; and Title VI of the Civil Rights Act of 1964. The Department's Regulation Sec. 60.2 reads:

> "Participants in Housing and Urban Development programs shall furnish such information as the Secretary may require concerning minority-group identification to assist the Secretary in carrying out his responsibility for administering the national policies prohibiting discrimination and providing for fair housing." 36 Fed. Reg. 10782 (June 3, 1971).

[17] Roettger memorandum, *supra* note 1.

[18] Even an explicit policy pronouncement as to the absolute voluntary nature of providing such data does not necessarily dispel the aura of coercion surrounding its collection. Individuals may continue to perceive the request as obligatory irrespective of any disclaimers to the contrary Further, notwithstanding the absence of civil or criminal penalties for failure to disclose such information, individuals may, nevertheless, perceive the supplying of this information as a condition to receiving Federal financial assistance, a perception which negates the voluntary character ascribed to its collection.

encroaches to some extent on an individual's privacy.[19] One then should advance a compelling reason such as legitimate governmental interest, which balanced against the real or perceived invasion, justifies the infringement on the individual's privacy.

The legal concept of invasion of privacy, i.e., in what instances a person's privacy is protected, has been slow to emerge. Moreover, even at this juncture in its evolution it is difficult to discern any real consensus as to the derivation of this "right" or to identify the kinds of invasions for which the law provides a remedy. Legal theories regarding invasion of privacy abound, running the gamut from tort[20]—or civil wrong—to constitutional ones. One definition of the right of privacy is as follows:

> The right to privacy is the right of the individual to decide for himself how much he will share with others his thoughts, his feelings, and *the facts of his personal life*.[21] (Emphasis added)

While this broad definition contributes little toward understanding the legal nuances of this concept, it is nevertheless a useful point of departure. Viewed in this context, the racial and ethnic identity of an individual clearly seems to be encompassed by this definition.

The privacy of individuals is protected by common law, statutes, and the Constitution. The common law[22] doctrine on invasion of privacy (as a tort or civil wrong)[23] was succinctly enunciated in an early law review article:

> The common law secures to each individual the right of determining ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.[24]

As of the mid-1960's, approximately 30 jurisdictions recognized some form of a common law right to privacy.[25] A few jurisdictions have established a statutory right.[26] The tort of invasion of privacy, whether predicated on common law doctrine or statutory authority has been the issue in more than 400 cases.[27] One leading commentator has identified four categories of tort representing breaches of four different types of privacy rights: intrusion (the act of intruding upon an individual's private affairs); disclosure (the act of making public embarrassing private facts about an individual); false light (the act of placing an individual in a false light in the public eye); and appropriation (the act of assuming an individual's name or likeness for the appropriator's advantage).[28] However, given the elements of these different breaches (as discerned from court decisions and legal treatises), coupled with the procedural safeguards recommended in this report, any legal action sounding in tort of privacy invasion taken against the practice of collecting racial and ethnic data for gross statistical purposes, would be extremely tenuous.[29]

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[19] Critics contend that if an individual is unaware that the private information is being "elicited" from him, a privacy issue arises. Paradoxically, however, some of the most vocal critics seem to have no objection to the "head count" method of collecting this information. *Hearings on S.3779 on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., at 131. (Remarks of Senator Samuel J. Ervin, Jr.).

[20] "A tortious act has also been defined as the commission or omission of an act by one, without right, whereby another receives some injury, directly or indirectly in person, property or reputation." (52 Am. Jur. § 2, footnote omitted).

[21] *Hearings on S.1791 before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary* 91st Cong., 1st Sess., at 771, citing as source of the definition the Office of Science and Technology, Executive Office of the President, Privacy and Behavioral Research Panel (1967). See also Beany, *The Right of Privacy and American Law*, 31 Law and Contemp. Prob. 253, 254 (1966) which defines the right as "the power of an individual to determine the extent to which another individual or group may obtain his ideas, writing or other indicia of his personality; obtain or reveal information about him, and intrude his life space."

Another law review article defined the right as being "largely a subjective, incorporeal right, difficult to identify and incapable of measurement." Ruebhausen and Brim, *Privacy and Behavioral Research*, 65 Colum. L. Rev. 1189 (1965).

[22] Common law is the body of law developed in England primarily from judicial decisions based on custom and precedent, unwritten in statute or code, and constituting the basis of the English legal system and of the system in all of the U.S. except Louisiana.

[23] An invasion of this common law right is viewed as a tort. See, Creech, *Psychological Testing and Constitutional Rights*, 66 Duke L. J. 333, n. 2 (1966) citing Prosser, Torts § 112, at 831-32 (3d ed. 1964).

[24] Warren and Brandeis. *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). While this article reputedly laid the intellectual foundation for recognizing invasion of privacy as an actionable tort, it was the Supreme Court of Georgia which "is considered to have laid the foundation for recognition of a right to privacy as a fundamental, legally protectable interest in *Pavesich* v. *New England Life Ins. Co.*, 50 S.E. 68, 69-70 (1905)." See Dixon, *The Griswold Penumbra: Constitutional Charter for An Expanded Law of Privacy*, 64 Michigan Law Rev. 197, 199 (1965).

[25] See Prosser, Law of Torts 831-32 (3d ed. 1964) and Ruebhausen and Brim, *supra* note 21 at 1197. The latter article also notes that "four States have rejected the existence of a right of privacy at common law." *Id*. See also Prosser, Handbook of the Law of Torts (4th ed. 1971), ch. 20 § 117 which identifies the States: Rhode Island, Nebraska, Texas, and Wisconsin. Another authority has suggested, however, that the common law right of privacy does not have the capacity to alleviate the privacy problems attendant to the rapid growth of computer technology and "the accelerating pace of Federal information gathering," concluding, therefore, that "judicial and congressional action . . . may be both appropriate and necessary." *Hearings on S. 1791*, *supra* note 21 at 197 (statement of Prof. Arthur R. Miller, Law School, University of Michigan).

[26] Four States have created a limited statutory right to privacy. *Federal Statistics*, Report of the President's Commission, Vol. I (1971) at 216, n. 2, listing New York (N.Y. Civ. Rights Law, Sec. 50-51), Oklahoma (Okla. Stat. Ann., Tit. 21, secs. 839-840), Utah (Utah Code Ann., sec. 76-4-9) and Virginia (Va., Code Ann., sec. 8-650). The N.Y. statute was held constitutional in *Rhodes* v. *Sperry and Hutchinson Co.*, 193 N.Y. 223, 85 N.E. 1097 (1908), *aff'd* 220 U.S. 502 (1911).

Every governmental action interferes to some extent with some personal privacy. The issue in each action is whether the attendant interference is proscribed by the Constitution.[30] In terms of collection of racial and ethnic data on prospective and actual beneficiaries of Federal financial assistance, it essentially becomes a question of whether the Constitution proscribes the kind of privacy intrusion which takes place in collecting racial and ethnic data.[31] However, the constitutional parameters of the right to privacy doctrine are not entirely clear. The kinds of intrusions on the privacy of the individual which are prohibited can only be gleaned from judicial decisions, most of which deal with "search and seizure" questions.[32]

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[27] Prosser, *Handbook of the Law of Torts* (4th ed. 1971) § 117.

[28] *Id.* See also Prosser, *Privacy*, 48 Calif. 383, 389 (1960). Prosser's categories were enumerated in the case of *American Credit Corp.* v. *U.S. Cas. Co.*, 49 F.R.D. 314 (D.C Ga. 1971).

[29] Typically cases in which relief is sought on this basis involve the use of a person's name or picture for advertising or trade purposes or publication of some private information concerning the individual even if true. However, where a person's activities have become part of the public domain, he or she is not entitled to the same degree of privacy. *Dodd* v. *Pearson*, 279 F. Supp. 101 (D.C.D.C. 1968), *aff'd in part, rev'd in part*, 410 F. 2d, 701, *cert. den.* 395 U.S. 947; *Klein* v. *McGraw-Hill, Inc.* 263 F. Supp. 919 (D.C.D.C. 1966). Further, "the statute of N.Y. and others patterned after it are limited by terms to uses for advertising or for purposes of trade, and the common law of other States may therefore be somewhat broader in its scope; *but in general there has been no very significant difference in the cases.*" Prosser, *supra* note 26 at 805 (emphasis added). And as another commentator noted: "[T]he tort remedy against most governmental intrusions is weak or nonexistent." Beany, *The Right to Privacy and American Law*, 31 Law and Contemp. Prob. 253, 259 (1966).

[30] *Katz* v. *U.S.*, 389 U.S. 347, 350 n. 5 (1967). The opinion, however, states that "the Fourth Amendment cannot be translated into a general 'right to privacy'." *Id.* at 350. See also *Rowan* v. *Post Office Department*, 397 U.S. 728 (1970); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949); and *Saia* v. *N.Y.*, 334 U.S. 558 (1948) regarding nongovernmental intrusions.

[31] A recent study points out that no explicit mention of the right of privacy can be found in the U.S. Constitution. *Federal Statistics*, *supra* note 26 at 196. This report notes, however, that "privacy considerations are certainly present in the First . . . ., Third . . . ., Fourth . . . ., and Fifth Amendment[s]." *Id.* at 216. n.1. If such a right does exist, an ancillary issue immediately arises as to whom it applies. As the Director of the Washington, D.C. American Civil Liberties Union stated:

> Most surveys, however, are not conducted by governmental bodies but are by private institutions and foundations. In such cases, the Constitution does not apply since the Constitution only applies against governmental bodies. *Hearings on S. 1791 supra* note 21 at 286.

In the context of racial and ethnic data collection regarding prospective (i.e., target and applicant) and actual beneficiaries of Federal financial assistance, the actual responsibility for collecting these data rests with the recipients. These recipients—the conduits through which the assistance flows to the ultimate beneficiaries—range from States to private organizations. Since the data requirements are federally imposed, it would be anomalous if a constitutionally recognized right to privacy (against governmental bodies) is abrogated because a "private" recipient is interposed in the chain of assistance.

[32] Specifically, the primary thrust of Supreme Court decisions concerning invasions of privacy has, until relatively recently, been directed at physical invasions of an individual's property rights with the outcome of cases principally turning on the Court's interpretation of fourth and 14th amendment protections. U.S. Const. Amend IV: "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause . . ." See, e.g., *U.S.* v. *Rabinowitz*, 339 U.S. 56 (1950) (upholding a warrantless search incident to an arrest although there was ample time to obtain a warrant); *Weeks* v. *U.S.*, 232 U.S. 383 (1914) (holding that in a Federal prosecution the fourth amendment barred the use of evidence secured through an illegal search and seizure); *Wolf* v. *Colorado*, 338 U.S. 25 (1949) (holding that in a State prosecution the 14th amendment does not bar the introduction of evidence secured in an unreasonable search and seizure); *Mapp* v. *Ohio* 367 U.S. 643 (1961) (reversing *Wolf* and applying the exclusionary rule to States). Although the Court once resisted attempts to extend fourth amendment protections to non-physical property, *on Lee* v. *U.S.*, 343 U.S. 747 (1952), *Goldman* v. *U.S.*, 316 U.S. 129 (1942), *Olmstead* v. *U.S.*, 227 U.S. 438 (1928), the Court eventually broadened its concept. See e.g., *Silverman* v. *U.S.*, 505 (1961); *Katz* v. *U.S.*, 389 U.S.

The *Griswold* v. *Connecticut*[33] decision in 1965 marked the real emergence of a judicially sanctioned constitution right of privacy[34] although this right had been considered in numerous cases before.

In nullifying the State law, the Court in *Griswold* applied a principle which had often been applied in earlier cases, that "a governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[35] This suggests that the Court seeks to balance governmental purpose for its action against encroachments on constitutionally protected freedoms.[36]

It is necessary, therefore, to determine what limitations there are on an individual's right to privacy.[37] Again, a test common to virtually all judicial decisions involving an otherwise valid governmental intrusion upon constitutionally protected rights has been the balancing of competing private and public interests.[38]

However, a feature common to virtually all cases

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347 (1967); *Berger* v. *N.Y.*, 388 U.S. 41 (1967). But see *U.S.* v. *White*, 401 U.S. 745 (1971) (warrantless third party electronic monitoring did not violate fourth amendment rights).

[33] 381 U.S. 479 (1965).

[34] See e.g., *id.* at 484:

> . . . [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.
>
> * * *
>
> Various guarantees create zones of privacy.

It should be noted that while the *Griswold* decision established a constitutional right of privacy, there were varying opinions among the Justices as to the basis of this right. On the one hand, the opinion of the Court held that "zones of privacy" were contained within the "penumbras" of certain express guarantees afforded by the Bill of Rights. The Court specifically referred to the first, third, fourth, fifth and ninth amendments. *Id.* at 484 (opinion of the Court by Douglas, W.). Concurring opinions, however, found the right of privacy was contained within the concept of liberty in the due process clause of the 14th amendment and grounded in the ninth amendment. *Id.* at 486, 491-492 (Goldberg, J., concurring), and at 500 (Harlan, J., concurring). Despite these separate theories, as one commentator noted: "The disagreement of members of the majority as to the constitutional underpinning of the claim is less important than the fact that they agreed a right to privacy had a constitutional basis and that justification for the Connecticut Act [banning contraceptives] was inadequate." Beaney, *supra* note 21 at 263.

[35] *NAACP* v. *Alabama*, 377 U.S. 288, 307 cited in *Griswold*, 381 U.S. at 485.

[36] This process of balancing competing rights and/or interests was more fully explained in a concurring opinion in the *Griswold* case:

> In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper State purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling,' *Bates* v. *Little Rock*, 361 U.S. 516, 524. [Cited in *Griswold* v. *Connecticut*, *supra* note 33, at 497.]

One law journal article, written in 1969, suggested that lower courts have been reticent in expanding the privacy doctrine set forth in *Griswold* because of the balancing language referred to above. See notes, ***Credit Investigations and the Right to privacy: Quest for a Remedy***, 57 Geo. L. J. 1116 (1969).

[37] It should be noted that while there is conspicuous absence of agreement as to the precise nature of this right, there is a general consensus that the right to privacy is not any more absolute than is the right to freedom of speech. The classic example of permissible abridgement of the constitutional guaranty of free speech was given in ***Schenck*** v. *U.S.*, 249 U.S. 47 (1919): "The most stringent protection of free speech would not protect a man [from criminal penalties] in falsely shouting fire in a theatre and causing a panic." (*id* at 52). See also ***Poe*** v. ***Ullman*** 367 U.S. 497, 552 (1961) (Harlan, J., dissenting) (". . . the right to privacy . . . is not an absolute. . . ."); ***Public Utilities Comm'n*** v. ***Pollack***, 343 U.S. 451 (1952) (Douglas, J., dissenting) ("The right to be let alone is indeed the beginning of all freedom. . . . A man loses that privacy of course when he goes upon the streets or enters public places.") (Douglas, however, felt that a violation of a broad right to privacy had been established); and ***Brownlee*** v. ***Bradley County, Tenn. Ed. of Ed.***, 311 F. Supp. 1360 (D.C. Tenn. 1970) ("Right to privacy, like other constitutionally guaranteed rights, is not absolute but is subject to regulation upon adequate showing of reasonable necessity therefor.")

[38] See, e.g., *Pollard* v. *Roberts*, 283 F. Supp. 248 (three judge court, E.D. Ark. 1968), *aff'd* 393 U.S. 14 (1968). The case involved a governmental attempt to learn the identity of political party contributors. The decision rested to a large extent on Supreme Court decisions relating to disclosure of identities of organization members (e.g., ***Gibson*** v. ***Florida Legislation Investigation Comm.***, 372 U.S. 539, 570 (1963) (Douglas, J., concurring); ***Louisiana ex rel Gremillian, Attorney General v. NAACP***, 366 U.S. 293 (1960); ***Shelton*** v. ***Tucker, supra; Bates*** v. ***City of Little Rock supra; NAACP*** v. ***Alabama ex rel Patterson, Attorney General***, 357 U.S. 449 (1958)), holding, in part that:

> [D]isclosure of the identities of members of the group can be compelled only by showing that there is a *rational connection between such disclosures and a legitimate governmental end, and that the governmental interest in the disclosure is cogent and compelling. Pollard* v. *Robub*, 283 F. Supp. at 256-57. (Emphasis added)

The same test must be applied to the parallel situation of racial and ethnic data collection.

where a balancing of interests [39] is required is that the right being abridged (e.g., speech, association, and by implication privacy) was being done under compulsion whereas the racial and ethnic data system being proposed by the Commission is a voluntary one; moreover, irrespective of any perceived coercion, however subtle, no penalties attach for nondisclosure, as distinguished from most of these cases. An applicant is completely free to refuse disclosure of his race or national origin without risk of being denied assistance on this ground; the only risk that may inhere in such a denial is that the person may be mistakenly identified as belonging to a particular minority or ethnic group, to the collective detriment of the group. If a white or black is mistakenly identified as being of Spanish ancestry (after declining to make a self-identification), it may contribute to an inflated and, therefore, misleading picture as to this group's representation among the ultimate beneficiaries; the obvious result is that the program may be incorrectly viewed to be in compliance.

Given the intrusive character of requesting any personal information, in this case racial and ethnic data, it is incumbent upon the proponents of such a system to advance a legal justification for its collection. The issue is simply "whether there is some greater public good that requires that kind of infringement." [40] As stated earlier, the answer should turn on a process of balancing competing interests and/or rights:

> What is required is the striking of a prudent balance between . . . the interest of the government to gather data necessary to the making of informed and sensible judgments and the interest of the individual to assert and safeguard his sense of dignity by controlling information about himself which he considers sensitive or personal.[41]

Before balancing the competing interests, however, one must establish that the governmental need for collecting racial and ethnic data is legitimate and that the specific data being collected are relevant to that need. The most obvious need relates to determining whether a program is operating in compliance with equal opportunity requirements. By way of illustration, Title VI of the 1964 Civil Rights Act stipulates that:

> No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[42]

Title VI further directs Agencies to effectuate the above provisions by issuing appropriate regulations.[43] It is virtually impossible for an Agency to assure nondiscrimination in its programs without having racial and ethnic data (of applicants, target beneficiaries, and actual beneficiaries) at its disposal. Relying on Title VI as authority, (see discussion *supra*) Agencies therefore issued implementing regulations which require recipients to keep records necessary for compliance purposes.[44]

As a recent Justice Department memorandum noted:

> Governmental collection of data, where there is a general showing of need for the information, has been consistently upheld by the courts. A government must be afforded appropriate means of gathering information necessary to assure that its programs are operating to reach intended beneficiaries. *Wyman* v. *James,* 400 U.S. 309 (1970).[45]

This memorandum also accurately reports that the collection of racial and ethnic data has been judicially sanctioned and even required in civil rights cases, citing *Singleton* v. *Jackson Municipal Separate School District,* 419 F. 2d 1211 (5th Cir. 1969), *Strain* v. *Philpott,* 331 F. Supp. 836 (M.D. Ala. 1971) (decree not reported), and *U.S.* v. *West Peachtree Tenth Corporation,* 437 F. 2d 221 (5th Cir. 1971) as examples.[46]

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[39] See, e.g., *Konigsberg* v. *State Bar of Calif.*, 366 U.S. 36, 51 (1960) ("Whenever the constitutional freedom of speech and association are asserted against the exercise of valid governmental powers a reconciliation must be effected requiring an appropriate weighing of the respective interests involved."); *Barenblatt* v. *U.S.*, 360 U.S. 109 (1959) ("[W]here first amendment rights are asserted to bar governmental interrogation, resolution of the issue involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."); *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960) ("Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."); *De Gregory* v. *Attorney General of New Hampshire* 383 U.S. 825, 829 (1966) "([T]he first amendment as well as the fifth, stands as a barrier to state intrusion of privacy. . . . There is no showing of 'overriding and compelling State interest' (*Gibson* v. *Fla. Legislative Committee*, 372 U.S. 539, 546) that would warrant intrusion into the realm of political and associational privacy . . . .").)

[40] *Hearings on S. 3779, supra* note 19 at 192.

[41] *Hearings on S. 1791, supra* note 21 at 216 (statement of Professor Charles Fried, Harvard Law School).

[42] 42 U.S.C. § 200(d) (1964).

[43] 42 U.S.C. § 200(d)-(1) (1964).

[44] See, e.g., 45 C.F.R. 80.6(b) (HEW): "Each recipient shall keep such records . . . as the responsible Department official . . . may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part." Other Agencies' implementing regulations contain a similar provision.

[45] Memorandum from David B. Marblestone, Chief, Title VI Section, Civil Rights Division, Department of Justice, to James P. Robinson, Budget Examiner, OMB, Dec. 21, 1971.

Since the key in invasion of privacy cases is whether there is a countervailing governmental, or public, interest which would justify subordination of an individual's right to privacy, clearly the countervailing interest in this case would be the Government's need for racial and ethnic data (i.e., statistical information) to assure compliance with congressionally mandated equal opportunity requirements. Several courts have found that the compilation of racial data by the State for statistical purposes constitutes no constitutional violation:

> Of course, the designation of race, just as sex or religious denomination, may in certain records serve a useful purpose, and the procurement and compilation of such information by State authorities cannot be outlawed per se. For example, the securing and chronicling of racial data for identification or statistical use violates no constitutional privilege. If the purpose is legitimate, the reason justifiable, then no infringement results. . . .[47]

In conclusion, there is a compelling reason to collect racial and ethnic data on beneficiaries: namely, for statistical purposes[48] which will enable Agencies, charged with enforcing Federal nondiscrimination laws and regulations, to ascertain the compliance status of their programs and on the basis of this information to institute appropriate corrective measures if warranted. Collecting racial and ethnic data, much like ascertaining sex, income, age, or other personal information for use in eligibility determination, is necessary for proper program administration. The Chairman of the Civil Service Commission offered the following defense of the minority questionnaire concerning Federal employment:

> On balance we believe that the rights of minority groups to equal employment opportunity, the right of the public to know what employment conditions in fact exist in their government, the right of the executive branch to respond to these public needs and to discharge its responsibilities to insure these rights, outweigh any diminution of the right of privacy which could be said to flow from a voluntary disclosure of one's race or national origin by means of a confidential questionnaire.[49]

The Commission believes this rationale is one that is equally applicable to the beneficiaries of Federal financial assistance.[50]

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[46] *Id.* at 12.

[47] *Hamm* v. *Virginia State Board of Elections,* 230 F. Supp. 156, 158 (three judge court, E.D. Va. 1964), *aff'd per curiam sub nom. Tancil* v. *Wools,* 379 U.S. 19 (1964). See also *Bryant* v. *State Bd. of Assessment,* 293 F. Supp. 1379 (E.D. N.C. 1968).

[48] See, e.g., Letter from M.F. Richman, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to K. Holbert, Acting General Counsel, EEOC, Aug. 7, 1967:

> It appears to us beyond dispute that the statistical information to be required by the Commission is "relevant to the determinations of whether unlawful employment practices have been or are being committed." See *Cassell* v. *Texas,* 339 U.S. 282, 284-286 (1950); *Swain* v. *Ala.,* 380 U.S. 202, 205-209 (1965).

See also *U.S.* v. *Moriarity,* 106 F. 886, 891-92 (C.C.S.D. N.Y. 1901): "The authority to gather reliable statistical data reasonably related to governmental purposes is a necessity if modern government is to legislate intelligently and effectively."

[49] Hearings on S. 3779, *supra* note 19 at 118.

[50] Once having overcome any invasion of privacy objections, one may be faced with the argument that the racial and ethnic data may be used to promote rather than prevent discrimination. Viewed from this perspective, it is then arguable that identification of beneficiaries of Federal assistance, by race or ethnic origin, is tantamount to a "classification" that violates an individual's constitutional right to equal protection of the laws or due process. See *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961) and *Bolling* v. *Sharpe,* 347 U.S. 497 (1957). And, in fact, there have been numerous challenges made on precisely these grounds. See, e.g., *Hamm* v. *Virginia State Board of Elections, Bryant* v. *State Board of Assessment, supra* note 47 and *Pedersen* v. *Burton,* Civil Action No. 1877-71 (D.C. D.C. September 1971).

When the maintenance of such records promotes separation by race and serves no useful purpose, courts have, in fact, held that Government records classifying persons by race or color transgress these rights. *Hamm* and *Bryant* cases, *supra.* It is significant, however, that no prohibitions on racial and ethnic records have been imposed on the collection of racial and ethnic data *per se,* but only on the maintenance of records with no legitimate purpose. See, e.g., *Hamm, supra* at 158. The collection of racial and ethnic data for legitimate purposes has been supported by the courts. *Hamm supra.* Race has also been viewed by the courts as a valid consideration for the development of affirmative action to overcome the effects of past discrimination. See, e.g., *Green* v. *County School Board of New Kent Co.,* 391 U.S. 430 (1968); *Gautreux* v. *Chicago Housing Authority,* 436 F. 2d. 306 (7 Cir. 1970), *reh den* 1971; *Gaston County N.C.* v. *U.S.,* 288 F. Supp. 678 (D.C.D.C. 1969), *aff'd* 395 U.S. 285 (1969); *U.S.* v. *Louisiana,* U.S. 145 (1965). Further, in a recent case challenging a re-

C. STATE-FEDERAL CONFLICTS

Conflicting State and Federal law raises the question to what extent State laws prohibiting discrimination and/or the collection of racial and ethnic data restrict Federal data collection essential to the enforcement of Title VI of the Civil Rights Act of 1964.

(This section will point out the legal issues involved in the interplay between State and Federal law.) Assuming that beneficiary and applicant contracts are voluntary, the conclusion is that such State laws are not impediments to Title VI enforcement. Either the State law may be interpreted to permit racial and ethnic inquiries or the State statute is unenforceable because of the superceding Federal interest in Title VI enforcement.

Federal Agencies' current and proposed regulations implementing Title VI authorize[51] State and local governments to conduct racial and ethnic surveys, make inquiries of applicants and beneficiaries concerning race and ethnicity, and seek from applicants racial and ethnic data on personnel and application forms. The plain reading of many State statutes,[52] however, has led numerous State officials to the conclusion that they are precluded from making racial inquiries, conducting such surveys, or noting racial or ethnic information in connection with applicants or beneficiaries.[53] The result is a situation of apparent conflict between the dictates of State law and the requirements expressed in the regulations or administrative circulars of the Federal Government.

Our starting point is the Supremacy Clause of the Constitution, Article VI, Clause 2, which requires that when Federal and State laws conflict, the State law must yield. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210-211 (1824). Regulations issued by Federal Agencies pursuant to powers conferred by statute have the force and effect of law and are also entitled to precedence over State law. *Leslie Miller, Inc.*, v. *Arkansas*, 352 U.S. 187, 188-190 (156); *King* v. *Smith*, 392 U.S. 309 (1968).

Situations requiring a determination of the supremacy of Federal law arise in manifold ways. Certain areas of governmental action are exclusive to the Federal Government and State law in these areas is preempted by Federal authority. The Constitution provides, for example, that the conduct of foreign affairs, the regulation of navigable waterways, and the issuance of coin or paper currency are within the exclusive power of the Federal Government.[54]

A second situation arises in areas where concurrent governmental authority exists and Congress "preempts the field". In this case it is necessary to find a congressional intent to override State legislation and establish a uniform nationwide scheme.

By "preempting the field" Congress may either legislate a national regulatory scheme that displaces existing State law, or it may provide a limited form of

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quirement to collect racial and ethnic data for the development of remedies to end discrimination, the court held that classification by race will be allowed to achieve equality and required to "avoid unequal treatment by race." *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, 931 (2 Cir. 1968). See also *Porcelli* v. *Titus*, 302 F. Supp. 726 (D.N.J. 1969), *aff'd* 431 F. 2d. 1254 (3 Cir. 1970) and *Otterman* v. *Nitkowski*, 378 F. 2d. 22, 24 (2d Cir. 1967).

[51] See discussion concerning Title VI, p. 81, *supra*.

[52] See, e.g. Ohio Laws Against Discrimination, Chapter 4112, Revised Code, § 4112.02 (E):

[It shall be an unlawful discriminatory practice] . . . for an employer, employment agency, or labor organization prior to employment or admission to membership, to: (1) elicit or attempt to elicit any information concerning the race, color, religion, national origin, or ancestry of an applicant for employment or membership; (2) make or keep a record of race, color, religion, national origin, or ancestry of any applicant for employment or membership.

See also New Jersey Law Against Discrimination, § 10:15-12C (pertaining to employment) and Michigan Laws, Ch. 2, § 564.201(g) and (h) (pertaining to housing practices).

[53] Throughout the study, there have been repeated references to such laws as impediments to Federal data collection. Interview with Arthur B. McGraw, Deputy Administrator, and staff, Food and Nutrition Service, Department of Agriculture, Aug. 4, 1971; interview with Edwin Kirby, Administrator, and staff, Extension Service, Department of Agriculture, Aug. 12, 1971; interview with Laurence Pearl, Acting Director of Equal Opportunity for Mortgage Credit Housing, and staff, Department of Housing and Urban Development, Sept. 16, 1971; interview with Arthur Chapin, Director, Equal Employment Opportunity and Manpower Administration staff, Department of Labor, Sept. 17, 1971; attachment to memorandum from Norman C. Roettger, Acting General Counsel, Department of Housing and Urban Development, to Samuel J. Simmons, Assistant Secretary for Equal Opportunity, Department of Housing and Urban Development, Sept. 8, 1970; Letter from Martin F. Richman, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Kenneth F. Holbert, Acting General Counsel, Equal Employment Opportunity Commission, Aug. 4, 1967; cover letter to Commission survey, from William L. Taylor, Staff Director, March 1967, in *For All the People . . . By All the People*, U.S. Commission on Civil Rights (1969).

[54] *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956) (invalidation of State subversive activities law).

regulation that precludes any further State action concerning the subject matter. Congress' power to regulate interstate commerce and the power to tax have been continually cited by Congress and the courts to limit State regulatory power. For example, the National Labor Relations Act has displaced any State regulation of unions and labor-management relations. Congressional regulation of cigarette labeling excluded any State bans on cigarette sales or State attempts to ban cigarette advertising.[55]

The final situation is one where no exclusivity or intent to preempt State law exists, but where a conflict exists between State and Federal law. In these cases, the State law is superseded where the repugnance or conflict is so "direct and positive" that the two acts cannot "be reconciled or consistently stand together." *Kelly* v. *Washington*, 302 U.S. (1937). The conflict between supposedly inconsistent State and Federal schemes is not always resolved against State law. A number of Supreme Court decisions have failed to find an impediment to the Federal interest, and found that State and Federal law could co-exist without Federal superseding of State law. See *Florida Lime and Avacado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963) or *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960). Essential to the outcome is an analysis of the State and Federal interests, and a determination that the achievement of the Federal interest is inconsistent with the State statutory purpose.

Civil rights legislation is an area of both State and Federal governmental power. Title VI of the Civil Rights Act of 1964 is one part of the Federal enforcement effort that includes various civil rights acts and Executive orders. The legislative history gives no indication that the Federal legislation including Title VI was supposed to preempt the legislative field and end the enforcement of State civil rights and antidiscrimination laws.[56]

Thus the Federal-State conflict with regard to racial and ethnic data collection is of the type that must be resolved by examining the Federal interest and the objection posed by the State law prohibiting racial data collection.

In a growing number of States the apparent conflict[57] has been resolved by State Attorneys General or court opinions. These decisions find that the purpose of these racial data collection prohibitions is to insure nondiscrimination in employment or housing applications.[58] Collection of data to determine Title

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[55] *Campbell* v. *Hussey*, 368 U.S. 297 (1961) (invalidation of State law barred by Federal Tobacco Inspection Act).

[56] In fact Federal civil rights legislation such as Title VII of the Civil Rights Act of 1964 and the Fair Housing Act of 1968 encourages the Administration of prior State antidiscrimination laws. The House Report of the proposed Title VII provides for Federal restraint "where there is a State or local agency which has effective power to eliminate and to prohibit discrimination in employment in cases covered by this title." U.S. Code Cong. and Admin. News 88th Cong. 2d Sess. 2405-06.

[57] One currently existing conflict between Federal requirements for racial and ethnic data collection and State law is between the Department of Labor's requirement that all State employment security offices provide racial and ethnic data on applicants for employment and a New Hampshire law which prohibits this recordkeeping. N.H., Rev. Stat. Ann. 282:22 III Supp., prohibits the collection of racial and ethnic data by the State employment service. This law has been amended to permit reporting by the Work Incentive Program and the Governor has indicated to the Manpower Administration that legislation will be introduced which will allow reporting for all State employment service programs. From 1967, when racial and ethnic data were first required by the Department of Labor, until 1969, State agencies operating in States with laws prohibiting the identification of race, color, or national origin were exempt from DOL's recordkeeping requirement (see Unemploymnt Insurance Program Letter No. 919 and Employment Service Program Letter No. 2238, DOL, June 23, 1967) in order to allow a reasonable time in which such laws could be amended or interpreted to permit State agencies to keep racial records (General Administration Letter 1002, June 23, 1966). In August 1968, it was announced that this exemption would be rescinded in June 1969, and that thereafter, State agencies not maintaining racial data would be in violation of DOL's requirement (General Administration Letter 1229, Department of Labor, Aug. 21, 1968). By August 1968, most agencies in States with laws prohibiting these data were, in fact, complying with the requirement. Currently, only New Hampshire has failed to comply with the requirement.

[58] The Ohio Attorney General reached this conclusion concerning the Ohio Laws Against Discrimination:

> The evident purpose of this prohibition against keeping records of race of applicants is to prevent an employer from utilizing knowledge as to the racial identity of applicants in a discriminatory manner. Moreover, the maintenance of such records by an employer pursuant to the terms of a conciliation agreement would not constitute a violation of [the law] so long as such information is not used to discriminate against any person. Ohio Attorney General Opinion No. 72-006, *supra*, at 18, 19.

The Attorney General of New Jersey has reached a similar conclusion of that State's data collection prohibition:

> [T]his section should not be interpreted in such a way as to deny to governmental agencies racial data needed in securing equal rights for all citizens . . . . Records kept by private individuals lose their discriminatory nature when they are kept as part of a State enforced program designed to eliminate discrimination . . . . *New Jersey*

VI compliance would serve a benign purpose that the State prohibition did not intend to foreclose. Thus, where the purpose of racial and ethnic data collection is to assure nondiscrimination, no statutory violation occurs.[59]

A conflict might also occur when additional Federal data requirements demand more than the prior State attorney general or court opinion permits.[60]

Where it is impossible for both the Federal and State interests to exist side by side, one interest must yield. The Federal interest is in nationwide uniform enforcement of Title VI. Such enforcement necessitates data that are similar in quality for all reporting units. A State law requiring approximation or prohibiting inquiries is just as unacceptable as a law that prevents any data collection whatsoever. When the Federal law is constitutional and its enforcement follows the intent of Congress, it is supreme over conflicting State law. The Federal Regulations promulgated to enforce Title VI are thus entitled to compliance by State officials regardless of the contrary command of State law.

Builders, Owners, and Managers Assn. v. *Blair*, Civ. Action No. A-370-70, Sup. Ct. N.J. (App. Div.), Brief of the Attorney General at 24.

[59] *See* Opinion of the Attorney General, State of Ohio, Opinion No. 72-006, Jan. 26, 1972.

[60] A Federal requirement of compulsory self-identification by beneficiaries or recipients is not treated separately here because neither the Commission nor any other Federal Agency has proposed compulsive disclosure regulations; and because it is an open question whether a Federal Agency has power under Title VI to require information of beneficiaries or recipients as opposed to the State agencies and program grant recipients that directly receive the Federal aid.

FINDINGS

1. Federal Agencies are responsible for insuring that there is no discrimination in their programs and that the assistance they provide reaches the intended beneficiaries. In most cases, however, Federal Agencies have not assigned specific responsibility for determining whether or not the distribution of program benefits is equitable.

2. Federal officials frequently base their confidence in the equitable operation of their programs upon inadequate evidence, such as absence of complaints, existence of impersonal mechanisms for decision-making, and personal knowledge of program operations. They have not generally been instructed that racial and ethnic data must be used to measure equitability in the distribution of program benefits.

3. Federal officials are often resistant to the collection and use of racial and ethnic data because they consider their collection illegal, subject to misuse, or an invasion of privacy, and insufficient information has been provided to contradict those beliefs.

4. The collection of racial and ethnic data to promote equitable distribution of Federal assistance is consistent with the Constitution and with Federal law and where it is necessary to eliminate discrimination it may be mandated. It has been endorsed by private organizations and Federal Agencies and most of the larger minority group organizations.

5. In general, the possibilities of invasion of privacy and of misuse of racial and ethnic data are less than the damage created by lack of information to document the extent of discrimination and are overcome by legitimate Government interest.

6. Racial and ethnic data serve important functions in several stages of the process of the distribution of Federal assistance.

a. Although the needs of particular racial and ethnic groups may vary, Agencies have generally not measured these differences nor taken them into account in program planning.

b. Agencies have not generally measured the extent to which their programs reach various racial and ethnic groups, and consequently have made only limited efforts to correct any deficiencies in the allocation of resources.

c. Although program impact may vary according to racial and ethnic group, Agencies have not generally measured these differences in evaluating program performance.

d. Where Federal assistance is distributed indirectly to beneficiaries through recipients, i.e., intermediaries, racial and ethnic data are necessary to measure the extent to which their operations are nondiscriminatory. Agencies have generally not collected racial and ethnic data for the purposes of reviewing the activities of recipients of Federal assistance.

e. Agency officials have not generally collected racial and ethnic data for the establishment of goals and timetables to achieve equitable distribution of program benefits and to measure progress toward these goals.

7. Few Agencies have required the collection and use of racial and ethnic data. Where such requirements have been made, sufficient data are generally not collected for analysis of the extent of nondiscrimination in Federal programs.

a. Almost no data are available on the race or ethnic origin of persons eligible to benefit from particular Federal programs.

b. A limited amount of data on the race and ethnic origin of applicants is available, although data often are not tabulated for rejected applicants.

c. A limited amount of data on the race and ethnic origin of beneficiaries of Federal programs is maintained. However, data on users of federally funded facilities, which are open to the general public, are almost nonexistent.

d. Data by race and ethnic origin on the amount of benefits received, on the characteristics of beneficiaries and potential beneficiaries, and on program impact are rarely collected.

8. Despite the existence of some requirements for the collection and use of racial and ethnic data, Agencies have generally not collected nor analyzed data for such important program areas as:

a. Negative program effects, such as cost or inconvenience to individuals as a result of program operations, which are often disproportionately borne by the minority community;

b. Secondary benefits, which occur as an indirect result of the primary program goals, but which are sometimes of sizable value and often less likely to reach minority beneficiaries than they are to reach majority beneficiaries;

c. Activities in which minorities have traditionally not participated, often because eligibility requirements or qualifications have effectively excluded them.

9. Where racial and ethnic data are collected, they are often collected for an insufficient number of racial and ethnic groups as, for example, black, white, and other.

a. American Indians, Asian Americans, blacks, persons of Spanish descent, and others, have been identified as groups with distinct needs and problems.

b. Even among these categories, problems and needs vary significantly. The two largest groups included within the category of Spanish descent are Mexican American and Puerto Rican; among Asian American groups, Chinese and Japanese.

c. Other groups which are statistically important in particular geographic areas include Cubans, Filipinos, Koreans, individual American Indian tribes, French Canadians, Portuguese, and Italians.

10. There has been a great deal of controversy over the preferable method of collecting racial and ethnic data. Even among Agencies with policies requiring their collection, there is no consensus as to whether this is better accomplished by observation or self-identification.

a. Self-identification is generally more accurate than observer-identification. In cases where designation of several specific minority groups is necessary, self-identification is imperative for accuracy.

b. Some Agencies have favored observer identification because of the belief that requests for self-identification constitute an illegal invasion of privacy. Whatever invasion of privacy occurs, however, is not dependent on the method of observation and, further, is overcome by legitimate Government interests.

c. Use of self-identification permits an individual to utilize the criteria of self-perception or perception in the immediate community.

11. In some instances racial and ethnic data can be obtained by an Agency from existing records, data collected by other Federal Agencies, or general purpose data collection agencies.

a. An adequate system of Federal data collection on participation in Federal programs by racial and ethnic groups is dependent upon comprehensive collection and compilation of minority group data by general purpose data collection agencies. It is essential that vital, economic, health, social, and population statistics be available concerning individual minority groups within this country.

b. Coordination among Federal Agencies has been poor and there has been little sharing of racial and ethnic data. Comparability between program data and that from such Agencies as the Bureau of the Census data is often low.

c. General purpose data, i.e., statistics gathered to increase information about a particular subject rather than for program administration, are sometimes not collected or compiled by race and ethnic origin; where they are so collected, the categories for collection are generally restricted to black, white, and other.

12. Agency officials need guidance with regard to the optimal frequency of data collection and the required amount of detail necessary to obtain comprehensive data, but few such guidelines have been provided.

a. The optimal frequency of data collection is chiefly dependent upon the expected rates of change in program statistics and the timetables which have been set to reach program goals.

b. The detail required depends upon the analysis to be conducted. Where Federal assistance is distributed through intermediaries, data upon which to evaluate the extent of nondiscrimination for each intermediary must be available.

13. A principal responsibility of the Office of Management and Budget (OMB) is to evaluate the effectiveness of Federal programs and make an assessment of the extent to which they reach their intended beneficiaries.

a. Federal program evaluation is one of the major aspects of the budget examination process and is accomplished principally through the review of budget submissions, the conduct of budget hearings, and the preparation of Special Analyses of the Budget.

b. A performance management system has been developed for the indepth evaluation of particular program areas.

c. OMB has recently placed emphasis on civil rights, but it has not yet instituted systematic evaluation of the extent to which Federal programs are reaching minority beneficiaries nor has it required such evaluations by Federal Agencies.

14. OMB is also charged with setting statistical standards for Federal data collection.

a. Throughout the Government, a variety of racial and ethnic categories are in use, collection methods are haphazard, and few guidelines exist for safeguarding data.

b. OMB is currently considering standardization of racial and ethnic categories, but has given little consideration to other technical areas.

15. OMB is responsible for coordination of Federal statistical activity.

a. There is substantial overlap between the data needs of some Agencies and the collection and/or production capacity of other Agencies.

b. While OMB has sponsored some coordinating activities between the Bureau of the Census and Agencies with programs of Federal domestic assistance, these activities have had only limited success. No other main efforts have been made at interagency coordination of data collection.

RECOMMENDATIONS

GENERAL

1. The Office of Management and Budget (OMB) should exercise strong leadership in the development and enforcement of a policy for the collection and use of racial and ethnic data.

a. OMB should require the collection and analysis of racial and ethnic data in all main programs of Federal assistance for the purpose of determining if such assistance reaches beneficiaries of various racial and ethnic groups on an equitable basis.

b. OMB should establish governmentwide standards for the collection and use of racial and ethnic data, which would provide a framework for Agency guidelines and insure consistency in Federal policy.

c. OMB should approve and annually review the guidelines adopted by each Federal Agency.

2. Where they have not already done so, each Federal Agency should issue a policy statement supporting the collection and use of racial and ethnic data as necessary to combat discrimination against minority groups in the distribution of Federal assistance.

a. Under the direction of OMB, Federal Agencies should issue guidelines explaining in detail how racial and ethnic data collection and use are to be accomplished.

b. Federal Agencies should provide technical assistance to program managers in the design of racial and ethnic data collection systems, in the analysis of the data collected, and in setting goals and timetables for remedying any deficiencies.

c. Federal Agencies should publish data on participation by racial and ethnic groups, showing the results of data analyses for each of their programs. Unpublished aggregate data should also be made available for use by other Federal Agencies, private organizations, and institutions.

THE DATA SYSTEM

1. An adequate racial and ethnic data collection system should require that program managers be responsible for knowing the number of potential beneficiaries, the number of applicants, and beneficiaries of their programs by race and ethnic origin. Data collection should be required for all negative program effects and all substantial secondary benefits.

a. Where Federal assistance is administered through a recipient, sufficient detail must be available to permit an evaluation of the operations of each recipient. Where there are a number of subrecipients, data should be available separately for each of them.

b. Where possible, estimates of the race and ethnic origin of potential beneficiaries should be obtained from data collected by the Bureau of the Census or other general purpose data agencies. Where no sources exist for data on the target population, sample surveys should be conducted to estimate program eligibility by race and ethnic origin.

c. Data on applicants and beneficiaries should be obtained on application forms used in the distribution of Federal assistance or in the recipients' activities. Data should be maintained on both successful and unsuccessful applicants. Where no applicant or participant records are maintained, surveys should be required on a regular basis.

2. As a minimum, the categories of American Indian, Asian American, Black, Spanish Descent, and Other should be required for use in programs of assistance and in general purpose data collection.

a. Separate data should also be obtained for Mexican Americans, Puerto Ricans, Chinese, and Japanese, unless a valid reason for failing to do so can be demonstrated.

b. Additionally, programs should be required to make provision for the collection of data on Cubans, Filipinos, Koreans, individual American Indian tribes, Portuguese, French Canadians, and other major concentrations of disadvantaged racial and ethnic groups, when data collection takes place in the local communities in which significant numbers of these groups reside.

3. Where data are obtained on application forms or other records, the collection should be continuous, and tabulations should be made on an annual basis as a minimum. Where data are obtained by survey, they should be collected annually.

4. Standards for racial and ethnic data collection should be established to insure that these data are of a uniformly high quality.

a. Where possible, racial and ethnic identities should be made by the applicant or beneficiary. The data collected should be validated on a sample basis through visual observation, to insure that accuracy is maintained. Identification by an observer should be permitted only to supplement, and not fulfill, Agency requirements for racial and ethnic data collection.

b. Persons should be permitted to identify themselves as they perceive their race or ethnic origin or as it is perceived by those in their immediate community.

c. General purpose data collection Agencies, especially the Bureau of the Census, should insure that adequate minority group statistics are collected, tabulated, and published These Agencies should work closely with OMB and Agencies administering Federal programs to insure comparability and high quality in all minority group statistics.

5. All data collection should be accompanied by appropriate safeguards against the misuse of the data collected.

a. Racial and ethnic data on individuals should not be made available on forms used for decisionmaking.

b. The disclosure of individual identities should be prohibited in any sharing of racial and ethnic data.

6. Supplementary data should be available for concomitant analysis with racial and ethnic data.

a. Data on personal characteristics relating to the need for Federal assistance and to eligibility for Federal assistance should be collected for potential beneficiaries, applicants, and beneficiaries.

b. Data on benefits received and program impact should also be available by race and ethnic origin.

7. The system should specify particular functions of racial and ethnic data.

a. Recipients, i.e., intermediaries, should be required to evaluate their operations through the collection and review of racial and ethnic data.

b. Potential recipients for Federal assistance should be required to submit data reflecting the race and ethnic origin of the population to receive Federal assistance and to provide data against which the target population can be compared, such as data on the race and ethnic origin of persons in the geographic area served by the recipient.

c. Racial and ethnic data should be used for scheduling compliance reviews on particular recipient's activities and in the conduct of those reviews.

d. Racial and ethnic data should be used to set numerical goals and timetables to remedy any defects in the distribution of Federal assistance to minority beneficiaries.

e. Racial and ethnic data should be used in program planning, program evaluation, and allocation of resources.

8. For each recipient of Federal assistance, and for each Federal program the system should measure, where appropriate, the extent to which:

a. Federal assistance reaches the intended beneficiaries of each racial and ethnic group;

b. The intended beneficiaries of each race and ethnic group apply for assistance;

c. Applications for assistance made by each racial and ethnic group are accepted;

d. The amount of benefit reaching beneficiaries of each racial and ethnic group is commensurate with each group's needs;

e. Full integration of activities and facilities takes place;

f. The goals of Federal programs are achieved for each racial and ethnic group.

9. Data collection or use deviating from the guidelines prescribed for the racial and ethnic data system must be authorized in writing by the Secretary or Chief Administrator of an Agency unless conducted as a supplement to that system.

THE OFFICE OF MANAGEMENT AND BUDGET

1. OMB should make use of the budget examination process to insure that Federal Agencies are informing themselves of the extent to which their programs reach minority beneficiaries on an equitable basis.

2. It should require that data on the number and race and ethnic origin of potential beneficiaries, applicants, and beneficiaries, as well as data on the amount of benefit distributed by race and ethnic origin be contained in Agency budget submissions.

3. Budget examiners should be directed to review any indications of deficient service to minority beneficiaries, referring to data stored within the Agency concerned and instructed to insure that remedial steps are taken.

4. OMB should study the possibilities of establishing a central data storage and retrieval mechanism to eliminate duplicate efforts in racial and ethnic data collection. For example, the idea of assigning a num-

ber to each person which would subsequently be used by Federal Agency officials to retrieve racial and ethnic information would obviate this problem and is worthy of study.

5. OMB should strengthen existing mechanisms for coordination between the data needs of particular Federal programs and data collection by the Bureau of the Census. It should also establish mechanisms to facilitate sharing racial and ethnic data among Federal programs.

6. OMB should publish in the *Special Analysis of the Budget* summaries of racial and ethnic data included in Agency budget submissions so that information about the extent of Federal assistance to minority beneficiaries will receive widespread circulation.

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